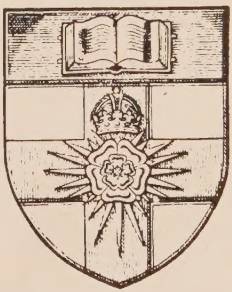
REFERENCE ONLY

346.4 MxNorth



UNIVERSITY OF LONDON
LIBRARY

Digitized by the Internet Archive
in 2026

https://archive.org/details/irish-reports_1894_1

THE IRISH REPORTS.

Incorporated Council of Law Reporting for Ireland.

Chairman.

MR. SERJEANT JELLETT.

Vice-Chairman.

J. H. MONAHAN, ESQ., Q. C.

Ex-officio Members.

THE ATTORNEY-GENERAL FOR IRELAND.

THE SOLICITOR-GENERAL FOR IRELAND.

Elected Members.

MR. SERJEANT JELLETT.
J. H. MONAHAN, ESQ., Q.C.
R. P. CARTON, ESQ., Q. C.
CONSTANTINE MOLLOY, ESQ., Q. C.
WILLIAM KENNY, ESQ., Q.C., M.P.
STEPHEN RONAN, ESQ., Q. C., *Queen's Advocate.*
MICHÁEL DRUMMOND, ESQ., Q. C.
EDWARD MORPHY, ESQ.
R. M. DANE, ESQ., M.P.
A. F. BLOOD, ESQ.
R. F. HARRISON, ESQ.
JONATHAN PIM, ESQ.
W. FINDLATER, ESQ.
J. A. FRENCH, ESQ.

Honorary Secretary.—JONATHAN PIM, ESQ., 49, Dawson-street, Dublin.

THE IRISH REPORTS,

PUBLISHED UNDER

THE CONTROL OF THE INCORPORATED COUNCIL OF LAW REPORTING FOR IRELAND:

CONTAINING

REPORTS OF CASES ARGUED AND DETERMINED

IN

THE COURT OF APPEAL,

THE HIGH COURT OF JUSTICE,

THE COURT OF BANKRUPTCY,

IN IRELAND,

AND

THE IRISH LAND COMMISSION.

EDITED BY

WILLIAM GREEN,

BARRISTER-AT-LAW.

1894.

VOL. I.

CHANCERY AND PROBATE DIVISIONS, AND COURT OF BANKRUPTCY.

DUBLIN:

PUBLISHED FOR THE INCORPORATED COUNCIL OF LAW REPORTING FOR IRELAND,

BY EDWARD PONSONBY,

116, GRAFTON-STREET, DUBLIN.

1894.

BIBL. LONDIN. UNIV.

IRISH REPORTS

Printed and Published
in Great Britain by
Professional Books Limited,
of Milton Trading Estate,
Milton, Abingdon, Oxon.

PROFESSIONAL BOOKS LIMITED

Lord Chancellor.

The Right Hon. Samuel Walker.

Lords Justices of Appeal.

The Right Hon. Gerald FitzGibbon.
The Right Hon. Charles Robert Barry.

Master of the Rolls.

The Right Hon. Andrew Marshall Porter.

Vice-Chancellor.

The Right Hon. Hedges E. Chatterton.

Probate and Matrimonial Division.

The Right Hon. Robert Richard Warren.

Land Judge.

The Right Hon. John Monroe.

Court of Bankruptcy.

The Hon. S. B. Miller.
The Hon. Walter Boyd.

Attorney-General.

The Right Hon. The Mac Dermot.

Solicitor-General.

Charles Hare Hemphill, Q. C.

[These Reports will be cited as follows :—[1894] 1 I. R.]

REPORTERS.

Court of Appeal,	ROBERT D. MURRAY, G. Y. DIXON,	Barristers-at-law.
Master of the Rolls, and Probate Division,	WILLIAM LAWSON, R. W. LUCAS,	Barristers-at-law
Vice-Chancellor,	D. M'C. MAHONY, T. HENRY MAXWELL,	Barristers-at-law.
Land Judge and Court of Bankruptcy,	WILLIAM GREEN,	Barrister-at-law.

TABLE OF CASES REPORTED

IN THIS VOLUME.

A.

PAGE

Addy, Dennis *v.* 511
Aikin's Assignees' Estate, *In re*, 225
Alcorn, M'Donnell *v.* 274, 298
Ambrose, *In the Goods of*, 310
Ardilaun (Lord), King *v.* 48
Attorney-General *v.* Drapers' Co., 185

B.

Bates, Hamilton *v.* 1
Beamish *v.* Beamish, 7
Belfast Ship Owners' Co., *In re*, 321, 329
Belton's Estate, *In re*, 537
Biddulph's Estate, *In re*; Provincial Bank of Ireland (Limited), Petitioners, 488
Blackrock Commissioners, *In re*; *Ex parte* Forde, 156
Boland *v.* Donnelly, 544
Brennan *v.* Brennan, 69

C.

Cayley, King-Harman *v.* 355
Chamier *v.* Tyrell (Tyrell, deceased), 267
Chanteperdrix, Wiley *v.* 209
Coan, Fisher *v.* 179
Collum, Poirez *v.* 378
Coyne *v.* Duigan, 138
Cramsie and Greer, *In re*, 135
Creed, Woodroofe *v.* 508
Crossley, *Ex parte*; *In re* Peel, 235, 240

D.

Davison's Estate, *In re*, 56
Davitt, *In re*, 517
Dennis *v.* Addy, 511
Donnelly, Boland *v.* 544
Drapers' Co., Attorney-General *v.* 185
Duigan, Coyne *v.* 138

F.

Fisher *v.* Coan, 179
Fitzsimons, Taaffe *v.* 63
————, Valentine *v.* 93
Forde, *Ex parte*; *In re* Blackrock Commissioners, 156

G.

PAGE

Gannon, Keenahan *v.* 412
Gavacan, *In re*, 183
Gibbon *v.* Wexford Infirmary, 26
Gray, deceased (Gray *v.* Gray), 65

H.

Hamilton *v.* Bates, 1
Hanlon, *In the Goods of*, 551
Hilliard *v.* Moriarty, 316, 319
Hinds and O'Reilly, Petitioners; *In re* Smith's Estate, 60
Hogan's Estate, *In re*, 503
Hurley's Estate, *In re*, 488

K.

Keenahan *v.* Gannon, 412
Kinahan's Estate, *In re*; Standard Life Assurance Co., Petitioners, 261, 266
King *v.* Ardilaun (Lord), 48
King-Harman *v.* Cayley, 355

M.

M'Donnell *v.* Alcorn, 274, 298
M'Glynn, Moore *v.* 74
M'Namara, Petitioner; *In re* O'Connor's Estate, 408
M'Neale, Peirce *v.* 118
Midland Great Western (Ireland) Railway Co., *In re*; *Ex parte* Rorke, 146
Moore *v.* M'Glynn, 74
——, Shea *v.* 158
Moriarty, Hilliard *v.* 316, 319

N.

PAGE

Nunn's Estate, *In re*; Nunn, Petitioner, 252

O.

O'Connor's Estate, *In re*; M'Namara, Petitioner, 408
O'Doherty, *In re*, 58
Orpen, Palmer *v.* 32

P.

Palmer *v.* Orpen, 32
Peel, *In re*; *Ex parte* Crossley, 235, 240
Peirce *v.* M'Neale, 118
Pirrie *v.* York-street Flax Spinning Co. 417
Poirez *v.* Collum, 378
Provincial Bank of Ireland (Limited), Petitioners; *In re* Biddulph's Estate, 488

R.

Rorke, *Ex parte*; *In re* Midland Great Western (Ireland) Railway Co., 146

S.

Shea *v.* Moore, 158
Smith's Estate, *In re*; Hinds and O'Reilly, Petitioners, 60
Smith, Wiley *v.* 153
Spurway *v.* Spurway, 385, 401
Standard Life Assurance Co., Petitioners; *In re* Kinahan's Estate, 261, 266

T.

PAGE
Taaffe *v.* Fitzsimons, 63
Tallon, *In the Goods of*, 57
Tyrell, Chamier *v.* (Tyrell, deceased), 267

V.

Vahy, *In re*, 335
Valentine *v.* Fitzsimons, 93

W.

PAGE
Wexford Infirmary, Gibbon *v.* 26
Wiley *v.* Chanteperdrix, 209
——— *v.* Smith, 153
Woodroofe *v.* Creed, 508
——————— *v.* Woodroofe, 299

Y.

York-street Flax Spinning Co., Pirrie *v.* 417

TABLE OF CASES CITED.

A.

PAGE

Adair *v.* Shaw, . . . 82, 84
Agnew *v.* Usher, . . . 193
Alchin, In the Goods of, . . 12
Alison's Case, . . . 279
Allen *v.* M'Pherson, . . 11, 24
American Braided Wire Case, 466
Andrews *v.* Emmot, . . 134
Archer *v.* Jegon, 36, 37, 40, 46, 47
Ashmore's Trusts, . . . 71
Astley *v.* Milles, . . . 254
Atcheson *v.* Atcheson, . 270, 271
Atkinson *v.* Atkinson, . . 172
Atter *v.* Atkinson, . . . 10, 22
Attorney-General *v.* Ailesbury, 253
——— *v.* Brunning, 253, 260
——— *v.* Darell, . 255
——— *v.* Hubbuck, 253, 257
——— *v.* Munro, 164, 165, 172
——— *v.* Murray, . 253
——— *v.* Partington, 253
——— *v.* Rathdonnell, 253
——— *v.* Rowe, . 390
——— *v.* Smith, 254, 255, 257
——— *v.* Wilkinson, 122
Australian Direct Steam Navigation Co., *In re*, 325, 327, 329, 331

B.

Badenach, Goods of, . . 553
Bagnalstown and Wexford Railway Co.; *Ex parte* Bagnall, 410, 411
Bagot *v.* Bagot, . . . 311
Bailie's Estate, *In re*, 1, 2, 3, 5, 6
Baldock *v.* Green, . . . 360
Baldwin *v.* Belcher, . 165, 169
Bamlett *v.* Picksley, . . 464
Barber, *In re*, . . . 61, 62
Barker *v.* Barker, . . . 71
Barnewall's Estate, *In re*, 1, 2, 3, 4, 5, 6
Barrs *v.* Jackson, . . . 279
Bawtree *v.* Watson, . . 229
Beamish's Trusts, . . . 384
Beauclerk *v.* Dormer, . 36, 37, 43
——— *v.* Hanna, . . 180
Becher *v.* Delacour, . 166, 171
Beckett *v.* Buckley, . . 169
Belk *v.* Slack, . . 212, 221
Bell *v.* Kennedy, . 389, 390, 406
—— *v.* Master in Equity of Victoria, ... 253
Bellairs *v.* Bellairs, . . 501
Bennett *v.* Gaslight and Coke Co., ... 82, 85
Berrington *v.* Evans, 492, 494, 499
Berry *v.* Briant, . . 219, 220
Besant *v.* Cox, . . . 301
Bethell *v.* Abraham, . . 360
Betts *v.* Doughty, . . . 12, 24
—— *v.* Menzies, . . . 466
Bignold, *Ex parte*, . . 184
Birks *v.* Birks, . . . 12
Birmingham *v.* Kirwan, . . 360
Bissill *v.* Bradford and District Tramways Co., . . . 227
Blackwood *v.* Damer, . . 11
Blake *v.* Gale, . . . 541
Blakemore *v.* Glamorganshire Canal Co., ... 279
Blanshard, *Ex parte*, . . 245
Booth *v.* Booth, . . . 82
Boulger *v.* Smith, . . . 83
Boulton *v.* Bull, . . 433, 477
Bovill *v.* Goodier, . . . 460
Bowers *v.* Bowers, . 301, 303, 308
Boyle, *Ex parte*, . . 166, 169
Bremer *v.* Freeman, . . 391
Briggs *v.* Wilson, . . . 164
Britain *v.* Hirsch, . . . 433

PAGE

Brook *v.* Astor, . . 430, 464
Broughton *v.* Broughton, . 61, 62
Brown, In the Goods of, . . 12
Browne *v.* Lord Kenyon, . 212, 221
Brownlow *v.* Keating, . 227, 231
Brunel *v.* Brunel, . . . 389
Brünner, *In re*, . . 183, 184
Bryant *v.* Cox, . . . 307
Bullock *v.* Downes, 38, 98, 99, 100, 103, 105, 107, 115
Burgess' Trusts, *In re*, 138, 144, 146
Butler *v.* Gilbert, . . . 490
Byrne *v.* Hargrave, . . 383
Bywater *v.* Clarke, . . 11

C.

Campbell *v.* French, . . 11
——— *v.* Harding, . . 36
Campbell (Lord Colin), *In re*, 523, 525, 532, 533, 537
Cannington *v.* Nuttall, . . 475
Castell *v.* Tagg, . . . 12
Castle Mail Packet Co., *Ex parte*; *Re* Payne, . . 522
Central Sugar Factories of Brazil, *In re*, . . . 329
Chalmers *v.* Wingfield, . . 389
Chambers, *Ex parte*, . . 183
Chambré's Estate, *In re*, . 360
Christian *v.* Devereux, . . 253
Churchill *v.* Dibben, . . 127
Clare (County) Infirmary, *In re*, 27
Cleary *v.* Fitzgerald, 489, 490, 495
Colclough's Estate, *In re*, . 542
Cole *v.* Wade, . . . 97
Colleton *v.* Garth, 140, 141, 143, 145, 146
Collins *v.* Elstone, . . . 13, 22
Commissioners of Charitable Donations *v.* Deey, . . 99
Concha *v.* Concha, . . 280, 281
Conlan's Estate, *In re*, . . 163
Cooke *v.* Torrens, . . . 67
Cookney *v.* Anderson, . 190, 200
Cooper *v.* Mac Donald, . . 36
Corry, *Re*, ... 227
Corsellis, *In re*, . . . 61, 62
Courtenay *v.* Williams, . . 172
Cowell *v.* Simpson, 228, 230, 231, 233
Cowx *v.* Foster, . . . 128
Cradock *v.* Piper, . 60, 61, 62, 63
Crane *v.* Price, . 431, 467, 481
Crawcour, *Ex parte*, . . 246
Crawhall's Trusts, *In re*, 212, 220
Cripps *v.* Walcott, 215, 220, 222, 301
Cruwys *v.* Colman, . . . 99

D.

PAGE

D'Arcy Irvine's Estate, *In re*, 360
Davey *v.* Ward, . . . 83
Davy *v.* Garrett, . . . 522
Davis *v.* Norton, . . . 36
Dawson's Estate, *In re*, 261, 262, 265
Day *v.* Day, 18, 98, 99, 100, 105, 115, 116
Deighton's Settled Estates, *In re*, 37
Dempsey *v.* Lawson, . . 11
Dennis *v.* Addy, . . . 513
Denny *v.* Barton, . . . 11, 12
D'Etchegoyen *v.* D'Etchegoyen, 390
Dighton *v.* Withers, 318, 320, 493, 495, 496, 499
Dillon *v.* Costello, . . . 490
Doe *v.* Liversedge, . . . 165
—— *v.* Shipphard, . . . 36
Donnelly *v.* Broughton, . . 22
Doucet *v.* Geoghegan, . . 389
Douglas *v.* Douglas, . . 389
Dowling, *Ex parte*, . . 150
———, In the Goods of, . 314
Druce *v.* Denison, . 143, 144, 145
Drummond *v.* Drummond, . 190
Duane, In the Goods of, . . 23
Dublin Junction Railway Co., *In re*; *Ex parte* Kelly, 149, 150, 153
Dyke *v.* Rendell, . . . 142

E.

Eagar, *In re*, ... 193
Ebbs' Estate, *In re*, . . 542
Edgington's Trusts, . . 36, 43
Edmunds *v.* Waugh, 165, 170, 171
Edwards *v.* Edwards, . 303, 304
Eyre *v.* Mac Dowell, . . 494

F.

Faithful *v.* Ewen, . . . 515
Farrelly *v.* Waller, . 180, 181
Farthing *v.* Allen, . . . 30
Ferrier *v.* Jay, . . . 12
Fiddey, *In re*, . . . 51
Foley *v.* Maillardet, . 190, 191
Footner *v.* Sturgis, . . 166, 167
Ford *v.* Wastell, . . . 16
Fordham *v.* Wallis, . . 17
Fox *v.* Fox, . . . 69, 71, 72
Freeman *v.* Freeman, . 194, 195
Fremoult *v.* Dedire, . . 49
French *v.* Davies, . . . 36
Fulton *v.* Andrew, . 12, 13, 22, 23

G.

Gadd *v.* Mayor of Manchester, 432, 47

PAGE

Gainsford *v.* Dunn, . . 122
Galland *v.* Leonard, . . 301
Gardiner *v.* Blesinton, . . 495
Gardner *v.* Gardner, . . 12
——— *v.* Jay, . . . 522
Gaskell *v.* Holmes, . . . 47
Gill *v.* Barrett, . . . 37, 42
Gladstone *v.* Tempest, . . 11, 13
Glynn, *Ex parte; In re* Medley, 493, 498
Godfrey *v.* Bryan, . 269, 270, 271
Goodacre *v.* Smith, . . 12
Grant *v.* Heysham, . . 37, 38, 46
Gray *v.* Gray, . . 83, 360
Greville *v.* Browne, . . 130
Grey *v.* Pearson, . . . 106
Griendtoveen *v.* Hamlyn, . 325
Guardhouse *v.* Blackburn, . 10, 22
Gurly *v.* Gurly, . 140, 142, 145

H.

Hagan *v.* Duff, . . . 360
Hall, *Ex parte; In re* Cooper, 184
Hamilton *v.* Dallas, . . 389
——— *v.* Wright, 82, 84, 165, 172
Hamilton's Estate, *In re*, . 495
Harding *v.* Glynn, . . . 99
——— (Lessee of) *v.* M'Namara, 253
Harnett *v.* Yielding, . . 181
Harris *v.* O'Loghlen, . . 409
Harrison *v.* Harrison, . . 514
Hart's Trusts, . . . 71
Harter *v.* Harter, . . . 22, 24
Harton *v.* Mabon, . . . 433
Harty *v.* Davis, . 166, 170, 171
Harvey *v.* Harnie, . . . 391
——— *v.* Harvey, . . . 37
——— *v.* Stracey, . . 128, 130
Harwood *v.* Great Northern Railway Co., 429, 430, 432, 433, 454, 464, 479, 481
Hastilow *v.* Stobie, . . . 10, 22
Haymes *v.* Cooper, . . . 513
Hayward, *Re*, . . 301, 307
Hayward *v.* Hamilton, . 432, 468
Heasman *v.* Pearse, . . 38
Heath *v.* Pugh, 164, 168, 169, 174, 176
Hegarty *v.* King, . . . 22, 23
Heneage *v.* Lord Andover, 361, 370
Henry *v.* Smith, . . 165, 176
Hepworth *v.* Heslop, . . 318
Herdman's Trusts, 122, 123, 130, 133
Hetherington *v.* Oakman, . 37, 41
Hicks *v.* Keat, . . . 253
Hill *v.* Walker, . . . 172
Hills *v.* Evans, . . . 459
Hinks *v.* Safety Lighting Co., 467
Hippesley *v.* Homer, . . 11

PAGE

Holloway *v.* Holloway, . 111, 112
Holyroyde *v.* Garnett, . . 64
Home *v.* Pringle, . . . 61
Hughes *v.* Coles, . . . 542
——— *v.* Turner, . . . 133
Hugill *v.* Wilkinson, 163, 164, 168
Hunt *v.* Anderson, . . . 313
Hunter *v.* Potts, . . . 332
——— *v.* Tedlie, . . . 100

I.

Ingram *v.* Soutten, . 304, 306, 307
Innes *v.* Sayer, . . . 134
International Pulp and Paper Co., *In re*, ... 326
Irish Land Commission *v.* Davies, 542

J.

Jack d. Rennick *v.* Armstrong, 490, 492, 500, 502
Jackson *v.* Whitehead, . . 554
Jarmain *v.* Chatterton, . . 522
Jenison *v.* Lexington, . . 67
Jenkins *v.* Jones, . . . 181
Jessop *v.* Cusack, . . . 384
Johnson *v.* Smaling, . 301, 307
Jones *v.* Bailey, . . . 169
——— *v.* Curry, . . . 123
———, *Ex parte*, . . . 495
——— *v.* Tucker, . . . 123

K.

Kay *v.* Marshall, . . . 463
Kaye *v.* Chubb, . . . 465
—— *v.* Sutherland, . 193, 194
Kehoe, In the Goods of, . . 12
Keillor's Estate, *In re*, . . 261
Keller, *In re*, . . . 343, 349
Kelly *v.* Enright, . . . 180
——, *Ex parte*, . . . 522
—— *v.* Kelly, . . . 12
Kennaway *v.* Kennaway, . 58
Kingston's (Duchess of) Case, 279
Knight *v.* Knight, . . 220, 222

L.

Lake's Trusts, *In re*, . . 166
Lancaster Canal Co., *Ex parte; In re* Dilworth, . . . 496
Lane Fox *v.* Kensington Electric Lighting Co., 433, 434, 471, 473, 474, 479, 481
Lauderdale Peerage Case, . 390
Lechmere *v.* Clamp, . . 166
Leonard *v.* Kellett, 318, 319, 320

PAGE

Lewis, In the Goods of, . . 11
Lincoln *v.* Windsor, . . 61, 62
Lindsay *v.* Earl of Wicklow, . 254
Lisbon-Berlyn Gold Fields Co. *v.* Heddle, . . . 194, 195
Lister *v.* Bradley, . . . 70, 71
Lloyd *v.* Mason, . . . 229
Lock, *Re; Ex parte* Poppleton, 239
London Joint Stock Co. *v.* Simmons, ... 482
Long *v.* Blackall, 100, 111, 112, 113
—— *v.* Symes, . . . 553
Longfield (Executors of) *v.* Keane, 383
Lord *v.* Colvin, . . . 253
Losh *v.* Hague, . . . 463
Luddington *v.* Kime, . . 36
Luddy, *Re*, . . 301, 308
Lumley, *In re*, . . 229, 233
Lysaght *v.* Lysaght, . . 254

M.

M'Dermott *v.* Balfe, . . 68
M'Donnell *v.* Prendergast, . 554
M'Henry *v.* Lewis, . . . 325
M'Kay *v.* M'Nally, . . 493
M'Manus, *In re*, . . 238
Maddison *v.* Chapman, 212, 213, 218
Mahalm *v.* M'Cullagh, . . 384
Mahony *v.* Davoren, . 2, 3, 4, 5, 6
Manson *v.* Baillie, . . . 61, 62
Mare, *Ex parte*, . . . 496
Marris *v.* Ingram, . . . 64
Marshfield's Case, . . 170, 171
Marsland, *In re*, . . . 391
Massey *v.* Haines, . . . 202
——— *v.* Sladen, . . . 496
Mattingley's Trusts, . . 130
Meluish *v.* Milton, . . . 11
Messer *v.* Boyle, . . . 169
Metcalfe *v.* Archbishop of York, 492, 496
Metropolitan Street Improvement Act, 1877; *Ex parte* Chamberlain, . . . 157
Millar *v.* Johnston, . . . 320
Minchin *v.* Minchin, . . 122
Missouri Steamship Co., *In re*, 329
Monck *v.* Monck, . . . 254
Monsell, *Re*, ... 490
Moor *v.* Anglo-Italian Bank, 325, 326, 328, 329, 331, 333, 334
Moore *v.* Holgate, . . . 58
Moore's Estate, *In re*, . . 542
Moorhouse *v.* Wainhouse, . 36
Morgan, *In re*, . . . 122
Morgan *v.* Windover, . 464, 483
Morley's Trusts, . . . 99
Mornington *v.* Keane, . 492, 494

PAGE

Morrell *v.* Morrell, . . 12, 22, 23
Mortimore *v.* Mortimore, . 100
Moser *v.* Marsden, . 433, 471, 473
Mulligan *v.* Adams, . . 265
Munro *v.* Munro, . . . 391
Muntz *v.* Foster, . . . 467

N.

Nannock *v.* Horton, . . 134
Natt, *Re*, . . 94, 98, 101
Neilson *v.* Betts, . . . 466
Neligan *v.* Roche, . . . 165
Neligan's Estate, *In re*, . . 2, 5, 6
New Ross (Guardians of the Poor of) *v.* Byrne, . . . 54
Niboyet *v.* Niboyet, . . 279
Nixon's Estate, *In re*, 501, 540, 542
North Carolina Estate Co., *In re*, 325, 326
Norton *v.* Johnston, . . 360
Nugent's Trusts, *In re*, . . 542
Nunn's Estate, *In re*, 252, 254, 255, 258

O.

O'Brien *v.* Fitzgerald, . . 164
——— *v.* Lewis, . . 227, 229
O'Callaghan, *In re*, . 339, 352
O'Connor *v.* Star Newspaper Co., 192
O'Leary *v.* Douglas, . . 11
Olivant *v.* Wright, . 301, 305, 307
Olney *v.* Bates, . . 37, 44, 47
O'Mahony *v.* Burdett, 301, 303, 304, 305, 306, 307, 308
O'Meagher *v.* O'Meagher, . 10
Oriental Inland Steam Co., *In re*, 325, 326, 328, 329
Orr *v.* Newton, . . . 554
Oswald, In the Goods of, . 23
Otto *v.* Linford, . . 469, 470
Outram *v.* Morewood, . 278, 281

P.

Page *v.* Leapingwell, . . 214
Paget *v.* Ede, . . . 325, 329
Pain *v.* Smith, . . . 164
Pallester and Son, *Ex parte; In re* Dunne, 236, 238, 239, 247, 248, 249, 251
Palmer *v.* Orpen, . . . 301
Parker *v.* Felgate, . . 10, 11
Parkinson *v.* Hanbury, . . 181
Patent Bottle Envelope Co. *v.* Seymer, ... 464
Penn *v.* Bibby, . . . 466
Pepper's Trusts, . . . 542

PAGE
Perrin *v.* Roe, . 1, 2, 3, 4, 5, 6
Pollok *v.* Kelly, . . . 269
Poole *v.* Prendergast, . . 180
Potinger *v.* Wightman, . . 391
Power *v.* Webber, . . 312, 314
Powis *v.* Mathews, . . . 37, 47
Powys *v.* Mansfield, . . 270
Price *v.* Carver, . . . 166
Priestman *v.* Thomas, . . 279
Pulsford *v.* Hunter, . . 71

R.

R. *v.* Hartington (Inhabitants of), ... 281
— *v.* Hutchings, . . . 281
— *v.* Registrar of Deeds for Co. Middlesex, . . 492, 495, 501
— *v.* Wye (Inhabitants of), 281, 296
Rawlings *v.* Jenkins, . 213, 214
Rayner *v.* Green, . . . 553
——— *v.* Mowbray, . . 110
Redfern *v.* Bryning, . . 36
Rees, *Ex parte*, . . . 183
Reilly *v.* Garnett, . . . 495
Reynolds *v.* Amos, . . . 468
Rhodes *v.* Rhodes, 12, 13, 22, 23, 25
Roberts *v.* Jeffreys, 226, 227, 231
Robinson *v.* Clarke, . . 12
Roche *v.* Roche, . . . 514
Rolleston *v.* Morton, 169, 175, 493
Ross *v.* Burke, . . . 311
——— *v.* Ross, . . 318, 319, 320
Russell *v.* East Anglia Railway Co., ... 342, 347
Ryan's Estate, *In re*, . . 2

S.

Sambourne *v.* Barry, . 140, 142
Sampson *v.* Pattison, . 164, 168
Saunders *v.* Vautier, . . 71, 72
Saxby *v.* Gloucester Waggon Co., 483
Scurfield *v.* Howes, 212, 214, 216, 219
Sweitzer *v.* Mayhew, . . 168
Seed *v.* Higgins, . . . 468
Selby *v.* Whittaker, . . 37, 46
Selkrig *v.* Davies, . . . 332
Shannon *v.* Casey, . . . 227
Shaw *v.* Neale, . . 227, 229
Shelford *v.* Acland, . . 123
Shepheard *v.* Beetham, . . 253
Shippey *v.* Gray, . . . 513
Sill *v.* Worswick, . . . 332
Simpson *v.* Morley, . 164, 169
Singer Sewing Machine Manufacturing Co.; *Re* Blackwell, 238
Slatter *v.* Slatter, . . . 145
Slattery *v.* Ball, . . . 301

PAGE
Smith *v.* Hurst, . . . 169
——— *v.* Peat, . . . 505
——— *v.* Stewart, . . . 301
Smyth *v.* Moore, . . . 67
Société Générale de Paris *v.* Dreyfus, ... 194
Solomon, *Ex parte*; *In re* Aubusson, . . . 227, 229
Somerville *v.* Somerville, . 390
South City Market Co., *In re*; *Ex parte* Keatley, . 149, 150
South-Eastern of Portugal Railway Co., *In re*, . . 325, 329
Spotten, In the Goods of (5 L. R. Ir. 403), ... 510
———, *In re* (12 Ir. L. T. R. 15), ... 521
Stead's Mortgaged Estates, 165, 542
Stephens' Estate, *In re*, 490, 492, 500, 502
Sterry's Estate, *In re*, . . 157
Stewart *v.* Connick, . . 164
Stooke, *Ex parte*, . . 246, 247
Storer, *In re*, ... 136
Stringer *v.* Phillips, . . 215
Sturge *v.* Great Western Railway Co., . . . 99, 100
Sturges *v.* Ryan, . . . 67
Swabey *v.* Swabey, 253, 254, 255
Sweeny *v.* Gallagher, . . 413
Sweeting *v.* Prideaux, . . 36
Swinburne, *Re*, . . . 128

T.

Taaffe *v.* Conmee, . . 212, 222
Tassell *v.* Hallen, . . 194, 391
Tatham *v.* Dania, . . 463, 464
Taylor, Deceased, . . 509, 510
Taylor, Stileman, and Underwood, *In re*, 226, 227, 228, 231
Teape's Trusts, . 122, 123, 128
Tempest *v.* Lord Camoys, 83, 97
Tennant *v.* Trenchard . 164, 172
Tetley *v.* Easton, . . . 464
Tewart *v.* Lawson, . . . 360
Tharp, In the Goods of, . . 12
Thomas *v.* Duchess of Hamilton, 193, 205
Thompson *v.* Watts, 140, 141, 142, 144
Thomson, In the Goods of, . 12
Thornton *v.* Finch, . . 169
——— *v.* Thornton, . . 128
Thurso New Gas Co., *In re*, . 325
Toft *v.* Stephenson, 166, 170, 171
Tottenham's Estate, *In re*, 279, 280, 294
Tribe *v.* Newland, . . . 220

U.

PAGE
Udney *v.* Udney, . . 389, 390
Underwood *v.* Darracott, 311, 313

V.

Vorley *v.* Richardson, 212, 213, 220, 222

W.

Walcott *v.* Condon, . . 262
Wallingford *v.* Mutual Society, 522
Ward *v.* Ward, . 269, 270, 271
Warter *v.* Hutchinson, . 361, 370
Watkins, *Ex parte; In re* Cousston, ... 238, 242
Watkins *v.* Scottish Imperial Insurance Co., . . . 389
Webb *v.* Honnor, . . . 130
Wellesley *v.* Mornington, . 342
Whaley *v.* Busfield, . . 192
Wharton *v.* Barker, 94, 99, 100, 104, 105, 108, 115, 116
Wheeler *v.* Addams, . . 37
Whicker *v.* Hume, . . . 397
White *v.* Baker, 212, 214, 216, 219
——— *v.* Gudgeon, . . . 318
Widdicombe *v.* Muller, . . 37, 38
Wilkes, *Ex parte; In re* Tarrant, 184
Williams, *In re*, . . . 122
Williams *v.* Lucas, . 492, 494, 499
——— *v.* Stevens, . . 82
Wilson *v.* Halliley, . 361, 370
——— *v.* Knox, . . . 71
Winder, *Ex parte*, . . . 157
Withy *v.* Mangles, . . . 98
Wollaston's Settlement, *In re*, 36, 37, 41
Wonham *v.* Mackin, . . 318
Workman *v.* Petgrave, . . 131
Wray, In the Goods of, . . 12
Wright, *Ex parte*, . . . 493
Wrixon *v.* Vize, . . 163, 164

Y.

Young *v.* Hodges, . . . 361
——— *v.* Rosenthal, . . 466

CASES

DETERMINED BY

THE CHANCERY AND PROBATE DIVISIONS

OF

THE HIGH COURT OF JUSTICE IN IRELAND,

AND BY

THE COURT OF BANKRUPTCY IN IRELAND,

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL.

1894.

HAMILTON *v.* BATES.

(1875. No. 2672.)

M. R.
1893.
March 3.

Sale—Practice—Rental and conditions—Tithe rentcharge—Compensation.

Fee-simple property was put up for sale, subject to an annuity of £16 16*s.* payable to the Board of Works for twenty-one years, from 21st November, 1891. No other charge or incumbrance was mentioned in the particulars of sale. The conditions of sale contained the usual provision, that in the event of there being any error, misstatement, or omission in the particulars, compensation might be made to the purchaser, the amount of such compensation to be settled by the Judge at Chambers.

The lands were subject to a tithe rentcharge of £3 2*s.* 4*d.* per annum, and the purchaser, on discovering this, applied for compensation :—

Held, by Porter, M.R., that the purchaser was entitled to assume from the particulars that the lands were not subject to tithe rentcharge, and that he was entitled to compensation.

Perrin v. *Roe* (25 L. R. Ir. 37) followed. *Barnewall's Estate* (Ir. R. 1 Eq. 304) and *Bailie's Estate* (31 L. R. Ir. 98) considered.

SUMMONS.

This was an application on behalf of the plaintiff that he might be at liberty, under the 6th condition of sale, to rescind the contract

M. R. 1893.

HAMILTON v. BATES.

for the sale of Lot 6 of the property sold in this action by public auction on the 11th August, 1891, at Gorey, in the county of Wexford.

The descriptive particulars of Lot 6 were as follows:—"The lands of Burnadown, situate in the barony of Gorey and county of Wexford, containing 76a. 3r. 34p., or thereabouts, are held in fee-simple, subject to an annuity of £16 16*s.*, payable to the Board of Works, for twenty-one years, from 21st November, 1891." There was no other charge mentioned in connection with this lot. Condition 8 of the conditions of sale was as follows:—"Each lot is believed to be, and shall be taken to be, correctly described in the particulars, and if any error, or misstatement, or omission be discovered, or shall appear to have been made in the above particulars, such error, misstatement, or omission is not to annul the sale, nor to entitle the purchaser to be discharged from his purchase, but a compensation may be made to the purchaser, and the amount of such compensation is to be settled by the Judge at Chambers."

Lot 6 on the estate was purchased by Edward Warren for £245. The purchaser, after the purchase-money had been lodged in Court, but before the execution of the conveyance, was applied to by the Land Commission for the sum of £3 2*s.* 4*d.*, the amount of an annual tithe rentcharge to which the lands comprised in this lot were subject. On receipt of this application the purchaser, who had gone into possession, made a claim for compensation by reason of the omission to state in the rental that the lands were liable to tithe rentcharge. Under these circumstances the plaintiff brought forward the present summons.

Matheson, Q.C., for the plaintiff:—

He cited *Barnewall's Estate* (1); *Ryan's Estate* (2); *Perrin* v. *Roe* (3); *Neligan's Estate* (4); *Mahony* v. *Davoren* (5); *Bailie's Estate* (6), decided by Monroe, J., on February 22nd, 1893.

John Stanley, Q.C., for the defendants.

(1) Ir. R. 1 Eq. 304.
(2) Ir. R. 3 Eq. 255.
(3) 25 L. R. Ir. 37.
(4) 29 L. R. Ir. 300.
(5) 30 L. R. Ir. 664.
(6) Since reported—31 L. R. Ir. 98, and affirmed on appeal, *ibid.* 373.

Ronan, Q.C., for the purchaser:—

The purchaser is entitled to compensation, as the particulars are silent as to the tithe rentcharge. It is a burden on the land, and therefore an incumbrance, in the ordinary sense of the term, though not one within the meaning of the Landed Estates Court Act. The reasoning of *Barnewall's Estate* (1) does not apply since the passing of the Irish Church Act, 1869, and a purchaser is not now bound to assume that lands are subject to tithe rentcharge. *Perrin* v. *Roe* (2), and *Mahony* v. *Davoren* (3), are in point. [He referred also to Rawle on Covenants for Title, p. 95, and Sugden's Vendors and Purchasers, p. 322.] *Bailie's Estate* (4) is distinguishable, as there Monroe, J., was dealing with the Landed Estates Court Act, and the practice thereunder.

THE MASTER OF THE ROLLS:—

I certainly did mean in *Perrin* v. *Roe* (2) to express my clear opinion upon the point now in issue. It is true that some of my observations in that case may not have been strictly necessary for the decision, as it was a case, not of tithe rentcharge, but of annual instalments by way of commutation for tithe rentcharge under the Irish Church Act. That case was, however, fully argued, and I do not desire to modify the opinion I then expressed, namely, that though of course I should have been bound by the decision of the Court of Appeal in *Barnewall's Estate* (1), if the facts and the law applicable to them had remained unaltered, the principle upon which that case had (in the main) been decided, viz. that everybody must be assumed to know that lands in Ireland are subject to tithe rentcharge, did not exist since the Irish Church Act. *Cessante ratione legis, cessat et lex.* Before the Church Act you were bound to assume, and inquire about, tithe rentcharge. Since that Act you are not necessarily to assume anything about tithe rentcharge at all. The *ratio decidendi* of *Barnewall's Estate* (1) was that nearly all land in Ireland was at that time subject to tithe rentcharge, and that every purchaser was bound to know that, and that if he did not choose to make inquiries as to the tithe rentcharge it was his own fault. It is quite true that another ground was

(1) Ir. R. 1 Eq. 304.
(2) 25 L. R. Ir. 37.
(3) 30 L. R. Ir. 664.
(4) 31 L. R. Ir. 98, 373.

M. R. 1893. HAMILTON v. BATES.

referred to in that case, viz. that tithe, and the rentcharge in lieu of it, was a separate incorporeal hereditament, co-existing with the land, forming part of the property of the Church, and so not an "incumbrance" upon the land. So long as the incorporeal hereditament was really separate from the land this might be so. But it issues out of the land. The land must pay it in the result; and I do not read the judgments as proceeding mainly, or even largely, upon this view. In the present case nothing turns upon the word "incumbrance"; and whether the rentcharge is or is not in strictness an incumbrance on the land sold, it is a deduction from the value of the property dealt with by the Court, of which a purchaser ought to have been informed.

I therefore come to the conclusion I did in *Perrin* v. *Roe* (1), that the main reason for the decision in *Barnewall's Estate* (2) was taken away by the Irish Church Act, and I think that that conclusion applies with increasing force every day. It was stated by Holmes, J., in *Mahony* v. *Davoren* (3), that at the present time about one-half of the land of Ireland was free from tithe rentcharge. It may be subject to these annual payments which have been substituted for tithe rentcharge by the Act, but the present application does not deal with such payments but with tithe rentcharge itself. There are now lands in Ireland which are free both from tithe rentcharge and from those annual payments. Is a purchaser of lands at the present time at liberty to say "I did not know that the lands were subject to tithe rentcharge"? He can say so now, in my opinion, with perfect truth, particularly when, as in the present case, the rental specifies other charges to which the lands are subject, and says nothing of tithe rentcharge. If land is put up for sale, subject to certain specified charges, the purchaser is justified in assuming that it is not subject to any other charge, such as tithe rentcharge. The conditions of sale in this case state, as regards Lot 6, that the premises comprised in it are sold subject to the yearly charge of £16 16s., payable to the Board of Works for twenty-one years from the 1st November, 1891, which is mentioned in the particulars of sale. That statement is enough to lead a person to conclude that there was no other charge upon the land; it certainly would not put him upon in-

(1) 25 L. R. Ir. 37. (2) Ir. Rep. 1 Eq. 304. (3) 30 L. R. Ir. 675.

quiry. In the case of the Queen's Bench Division of *Mahony* v. *Davoren* (1), the question was not one of compensation to a purchaser on account of the non-disclosure of the existence of tithe rentcharge. It was an action of negligence against a solicitor for not including in the conditions of sale of a property that it was subject to annual instalments for the purchase of the tithe rentcharge; the purchaser, having discovered that the premises were liable to these annual instalments, claimed compensation, and was allowed by the vendor £70 out of the purchase-money, and thereupon the vendor brought an action against his solicitor for negligence. The Court decided in favour of the solicitor, on the ground that there was no negligence on his part, and that the solicitor was not responsible for not having been aware of the decision in *Perrin* v. *Roe* (2), which was reported in March, 1890, some months before the solicitor was employed to sell the property.

Perrin v. *Roe* (2) was discussed in that case, and there is nothing in the judgment to show that the members of the Court disapproved of the opinion I there expressed as to *Barnewall's Estate* (3): on the contrary, Holmes, J., apparently approves of it, and the other judges do not dissent.

The question then is, should I act upon my own opinion, or adopt the rule of the Landed Estates Court, where *Barnewall's Estate* (3) has been followed to the present time? I need hardly say that I should willingly follow any considered decision of Monroe, J., that is in point. I have been referred to two recent cases, where the question arose before him: the first is *Neligan's Estate* (4), which was decided on February 19th, 1892, about a week before the decision in *Mahony* v. *Davoren* (1). There the conditions of sale contained no statement as to tithe rentcharge, and the purchaser bought the lands in ignorance of the fact of the existence of any tithe rentcharge. Monroe, J., refused the application of the purchaser for compensation in respect of the existence of tithe rentcharge, following *Barnewall's Estate* (3). *Perrin* v. *Roe* (2) does not appear to have been cited. The next case is that of *Bailie's Estate* (5), decided by

(1) 30 L. R. Ir. 664.
(2) 25 L. R. Ir. 37.
(3) Ir. R. 1 Eq. 304.
(4) 29 L. R. Ir. 300.
(5) Since reported—31 L. R. Ir. 98, affirmed on appeal, *ibid.* 373.

M. R. 1893. HAMILTON v. BATES.

Monroe, J., on February 22 in the present year. The facts of that case, and the point of the decision, have been stated during the argument by Mr. Hume, who was counsel in the case, as *amicus curiæ*. The lands there were put up for sale in October, 1889, under a rental and conditions, which made no reference to the existence of tithe rentcharge. A portion of the property was sold to tenants in 1890, and conveyances executed in 1891. It was subsequently discovered that the lands sold were subject to tithe rentcharge, and an application was made by the purchasers to Monroe, J., for compensation. *Barnewall's Estate* (1), *Neligan's Estate* (2), *Perrin* v. *Roe* (3), and *Mahony* v. *Davoren* (4) were all cited. Monroe, J., as I understand, pointed out that the rental was prepared before the publication of the decision in *Perrin* v. *Roe* (3), in which it was for the first time suggested that the ground of the decision in *Barnewall's Estate* (1) no longer applied, and he refused the application, on the ground that the purchase was made according to the settled practice of his branch of the Court, by which a purchaser was not entitled to compensation for tithe rentcharge merely because no reference to its existence was contained in the conditions of sale. At the same time, with the good sense that characterizes that learned Judge, he declared (as has been stated) that he would prevent the question arising again by having a condition inserted in future that lands would be sold free of tithe rentcharge or annual instalments where there was no reference to their existence in the conditions of sale. I have given directions to my conveyancing counsel that in future, in settling particulars and conditions of sale in my Chambers, the existence or non-existence of tithe rentcharge or instalments shall, in all cases, be specifically stated.

I am of opinion that there is nothing in this case of *Bailie's Estate* (5) to prevent my acting upon my own opinion in this Court, where the Landed Estates Court practice does not prevail, and where I may fairly assume that practitioners are aware of *Perrin* v. *Roe* (3). It is better, too, that I should act upon my own opinion now, particularly in a small case, where it would be unreasonable to put the parties to the expense of an appeal,

(1) Ir. R. 1 Eq. 304.
(2) 29 L. R. Ir. 300.
(3) 25 L. R. Ir. 37.
(4) 30 L. R. Ir. 664.
(5) 31 L. R. Ir. 98, 373.

which would of course be invited, if I decided against my own avowed opinion.

I hold, therefore, that the existence of the tithe rentcharge should have been mentioned in these conditions of sale, and as it was not mentioned that the purchaser is entitled to compensation, and as the parties are willing that I should now decide the matter on the materials before me, I shall fix the amount at £45.

Solicitor for the plaintiff: *W. S. Collis.*
Solicitor for the defendants: *John H. Hogan.*
Solicitor for the purchaser: *John A. French.*

W. L.

BEAMISH *v.* BEAMISH.

(1892. No. 67.)

Probate—Omission of clause in will by mistake—Presumption as to knowledge and approval of contents.

A testator made a will in 1887, containing a clause by which he directed that in the event of his son W. B. dying unmarried and having no male heir to possess and inherit the estate, it was to go to A. M. B., the eldest son of his son R. B. In October, 1891, the testator made another will, which was copied by his daughter, under his directions, from the will of 1887, with certain alterations. It did not contain the clause above mentioned.

In November, 1891, the testator, being dissatisfied with the will of October, 1891, requested a relation to draw up a new will, which he accordingly did, and left it with the testator for his approval. The testator shortly afterwards executed it. This will did not contain the clause above mentioned, but provided that in the event of his son W. B. marrying without the consent of his executors the estate was to go to his son R. B. for life, and after his death to A. M. B., son of R. B. Both the wills of October and November, 1891, contained the usual revocatory clause.

A. M. B. alleged that the clause above mentioned had been omitted from the wills of 1891 by mistake, and brought an action against the executors and W. B. to have the three wills admitted to probate, with a declaration that the clause above mentioned had not been revoked, or in the alternative to have the three wills admitted to probate, with the revocatory clauses omitted.

One of the executors and W. B. propounded the will of November, 1891.

Parol evidence was given as to the circumstances under which the wills were prepared and executed.

Probate. 1893. BEAMISH v. BEAMISH.

The Court was of opinion that there was no sufficient proof that the clause in question had been omitted by mistake, and further, that even if the clause had been omitted by mistake it could not make the decree asked for by the plaintiff. The Court also held that, under the circumstances, the testator must be taken to have known and approved of the contents of the will of November, 1891, and directed it to be admitted to probate.

The law as to when knowledge and approval of a will is to be presumed considered.

TRIAL OF ACTION.

This action was brought by Alfred Marmion Beamish, an infant, by Richard Beamish his father and next friend, against Henry George Beamish, John Beamish, and George B. Sweetman, sued as executors and trustees of the will of Henry Baldwin Beamish, dated 3rd November, 1891, and against William Beamish as legatee and devisee in the said will.

The statement of claim alleged that the plaintiff was a legatee named in the will of the testator, dated 3rd June, 1887, who died 28th July, 1892, having duly executed the said will, with five codicils thereto. That the said will contained a clause in the words following:—"But should he (that is to say), the testator's son (the defendant), William Beamish, die unmarried, or having no male heir to possess and inherit the estate, subject to the annuities, charges, and conditions mentioned in this my will, then and in that case I leave and bequeath the estate, subject to the annuities, charges, and conditions aforesaid, to Marmion Beamish (the plaintiff), the eldest son of my son Richard Beamish, M.D." That the testator subsequently made two wills on 24th October, and 3rd November, 1891, respectively, each of which contained a revocatory clause, purporting to revoke all previous wills, but which said wills, so far as they purported to revoke the said clause in the will of 3rd June, 1887, were executed by the testator under a mistake of fact, namely, that the said wills contained the said clause contained in the will of 3rd June, 1887, whereas the said clause had, without the directions of the testator, and without his knowledge or approval, been omitted therefrom by a mistake of the person who wrote out the wills of 24th October and 3rd November, 1891, and that the testator did not intend by the said wills to

revoke the clause in the will of 3rd June, 1887, and that the same was not revoked thereby.

That so far as the said wills of 24th October and 3rd November purported, by the revocatory clauses therein respectively contained, to revoke the said clause in the said will of 3rd June, 1887, the testator did not know and approve of the revocatory clauses therein, or the contents thereof.

The plaintiff claimed :—

1. To have it declared that the said clause in the said will of 3rd June, 1887, had not been revoked.

2. To have the said will of 3rd June, 1887, together with the said will of 24th October, 1891, and 3rd November, 1891, admitted to probate, as together constituting the will of the said deceased.

3. In the alternative to have the said wills of 24th October, 1891, and 3rd November, 1891, admitted to probate, omitting therefrom the revocatory clauses therein respectively contained, and to have it declared that the said will of 3rd June, 1887, is entitled to be admitted to probate, as constituting, along with the said wills of the deceased, dated 24th October and 3rd November, 1891, respectively, the last will of the deceased.

The defendants William Beamish and Henry George Beamish, by their statements of defence, denied the allegations in the statement of claim, and, by way of counterclaim, asked to have the will of 3rd November, 1891, admitted to probate, without the said clause. The defendants John Beamish and George Sweetman put in no defence.

The action was heard before the Court itself, without a jury.

The material facts proved in evidence are stated in the judgment.

Adams, Q.C. (with him *H. D. Conner*), for the executor, Henry George Beamish :—

We ask, by our counterclaim, that the will of 3rd November, 1891, be admitted to probate.

[He then stated the facts of the case, which are summarized in the judgment.]

Probate. 1893. BEAMISH v. BEAMISH.

The testator knew and approved of the contents of this will: *Guardhouse* v. *Blackburn* (1).

The Right Hon. John Atkinson, Q.C. (with him *Seymour Bushe, Q.C.*, and *P. D. Fleming*), for the defendant William Beamish:—

The will of 3rd November, 1891, should be admitted to probate as it stands. It is a plain document, duly executed and attested. The testator understood how to execute wills, and this will was prepared for him by a person in whom he had complete confidence, and on instructions given to him by the testator. The will was left with the testator, in order that he might read it, and the inference to be drawn from the evidence is that he did read it. His subsequent statement to his daughter that the will would have to be altered to carry out his wish to provide a farm for his son John confirms the presumption that he knew and approved of the contents of this will. There is no ground for the contention of the plaintiff that the clause in the will of June, 1887, was omitted by mistake from the will of 3rd November, 1891. The person who prepared the will took no benefit under it, therefore there is no *onus* on him to show that the testator knew and approved of the contents of the will. [He cited *Hastilow* v. *Stobie* (2); *Atter* v. *Atkinson* (3); *Parker* v. *Felgate* (4); *O'Meagher* v. *O'Meagher* (5).]

Ronan, Q.C., and *Samuels*, for the plaintiff:—

We admit that the *onus* is shifted upon us of proving that there was no intention of revoking the particular clause in the will of June, 1887, which we say was omitted by mistake from the later wills. But if the Court is satisfied that the testator intended that clause to stand, it must give effect to the disposition of the testator, though there is a revocatory clause.

The authorities show that where there is a revocation by mistake the revocation is bad. The argument for the defendants is that the testator's affection for William being on the increase he deliberately gave the estate to William. But there is

(1) L. R. 1 P. & M. 109.
(2) *Ibid.* 64.
(3) *Ibid.* 665.
(4) 8 P. D. 171.
(5) 11 L. R. Ir. 117.

no gift in the will to William, except in the clause struck out, and therefore William would take no estate in land, he only gets Muckruss and £50. Dispositions and not papers are to be looked at in this Court: *O'Leary* v. *Douglas* (1); *Dempsey* v. *Lawson* (2); Shelford's Real Property Statutes, p. 410. If there is a mistake of fact as to the revocation, there is no revocation: *Goods of W. Lewis* (3); *Campbell* v. *French* (4).

We desire to get probate of the three wills, together with a declaration that the testator did not intend by the will of 3rd November, 1891, to alter the disposition in favour of Marmion Beamish. As to revocations, see 1 Eq. Cas. Abr., p. 407; Cruise's Digest, vol. 6, p. 73; Williams on Executors, p. 167.

The Court can investigate the validity of a revocatory clause: *Denny* v. *Barton* (5). We submit that this clause was accidentally omitted from the wills of 1891, and that the testator did not detect the omission: *Parker* v. *Felgate* (6) does not apply where there is a mistake in the instructions as here.

The Court of Chancery has no jurisdiction to interfere in a case of this kind, this Court having exclusive jurisdiction: *Allen* v. *M'Pherson* (7); *Meluish* v. *Milton* (8); *Bywater* v. *Clarke* (9). It is the duty of this Court to establish by its decree every unrevoked testamentary disposition of a testator, and not to give effect to a will of which he did not know and approve. Probate may be granted of a paper of a date prior to a will containing a revocatory clause, if the Court is satisfied that it was not the intention of the testator to revoke the particular legacy or benefit: *Gladstone* v. *Tempest* (10). In *Hippesley* v. *Homer* (11), a suit to set aside a legacy, an issue was directed to try whether a particular clause formed part of the will of a testator. In *Blackwood* v. *Damer* (12), where a residuary clause contained in the testator's instructions for his will was omitted by mistake from the will itself, the Court decreed that the residuary clause should stand as part of the will.

(1) 3 L. R. Ir. 323.
(2) 2 P. D. 98.
(3) 14 Jur. 514.
(4) 3 Ves. 321.
(5) 2 Phill. 575.
(6) 8 P. D. 171.
(7) 1 H. L. Cas. 191.
(8) 3 Ch. Div. 27.
(9) 18 Ch. Div. 17.
(10) 2 Curt. 653.
(11) 1 T. & R. 48 n.
(12) 3 Phill. 458 n.

Probate. 1893. BEAMISH v. BEAMISH.

In *In the Goods of Wray* (1), clauses which were not brought to the knowledge of a testatrix were ordered to be omitted from the copy of the will annexed to the grant of administration. So, too, collateral matters can be placed on the decree of the Court. *In the Goods of Thomson* (2); *In the Goods of Alchin* (3); *In the Goods of Brown* (4); In *Robinson* v. *Clarke* (5), two documents of different dates were admitted to probate, though the later document contained a revocatory clause, because the two documents were not necessarily inconsistent. It is said that here the presumption is conclusive, that the testator knew and approved of the contents of the will. But it is submitted that there is no such rigid rule of law: *Fulton* v. *Andrew* (6); and that the presumption is not a *presumptio juris et de jure*, but a presumption of fact: *Gardner* v. *Gardner* (7). It is submitted that the testator did not read the will at all. Again, though he may have generally known and approved of the contents, he did not know and approve of the omission of the clause in the will of October, 1887.

If the Court will not make a declaration such as we ask, it should admit the three wills to probate, omitting the revocatory clauses.

[They also referred to *Castell* v. *Tagg* (8); *Birks* v. *Birks* (9); *Rhodes* v. *Rhodes* (10); *Goodacre* v. *Smith* (11); *Morrell* v. *Morrell* (12); *Betts* v. *Doughty* (13); *Goods of Tharp* (14); *Goods of Kehoe* (15); *Kelly* v. *Kelly* (16); Coote and Tristram p. 449; Williams on Executors (8th ed.), p. 175.]

Bushe, Q.C., in reply:—

There is no evidence to rebut the presumption that the testator knew and approved of the contents of the will of November, 1891. *Birks* v. *Birks* (9) was quite a different case. *Denny* v. *Barton* (17),

(1) Ir. R. 10 Eq. 266.
(2) L. R. 1 P. & M. 8.
(3) *Ibid.* 664.
(4) 2 P. D. 110.
(5) *Ibid.* 269.
(6) L. R. 7 H. L. 448.
(7) 2 App. Cas. 723.
(8) 1 Curt. 298.
(9) 4 S. & T. 23.
(10) 7 App. Cas. 192.
(11) L. R. 1 P. & M. 359.
(12) 7 P. D. 68.
(13) 5 P. D. 26.
(14) 3 P. D. 76.
(15) 7 L. R. Ir. 343.
(16) 23 L. R. Ir. 136.
(17) 2 Phill. 575.

Gladstone v. *Tempest* (1); *Fulton* v. *Andrew* (2); *Rhodes* v. *Rhodes* (3), and *Collins* v. *Elstone* (4) are in favour of the defendants. The Court is in effect asked to make a new will for the testator.

Probate. 1893. BEAMISH v. BEAMISH. March 27.

THE PRESIDENT:—

Henry Baldwin Beamish, the testator, died in July, 1892, at the age of 92. He signed numerous testamentary papers, and amongst others a will, 3rd June, 1887; five codicils, dated in 1887, 1888, 1889, and 1891; and two wills dated respectively 24th October, and 3rd November, 1891. In all these wills Henry George Beamish, a son of the testator and a defendant in this action, was named an executor, with two other persons.

The question in this action is, what testamentary paper or papers is the last will of the testator. The due execution of all the papers I have mentioned has been proved, and the full capacity of the testator when he signed has not been disputed.

Henry George Beamish, the executor, and William Beamish, also a son of the testator, have both propounded the will of November, 1891, as alone the last will of the testator.

Mr. Henry Baldwin Beamish had several children, amongst others Henry George, William, John, and Richard, and Sarah, a witness in the case. He had real and personal property of considerable value.

The testator appears to have made a will in 1884, prepared for him by an intimate friend, the Rev. George Beamish. This will was not given in evidence.

In May, 1887, the testator wrote a letter to the Rev. George Beamish, in which, speaking of a contemplated assignment, he says:—"Should my son William not leave male issue, who should attain twenty-one, the reversion of my property was not to go to my son John, but to Marmion, son of Richard, or any other person I should appoint to inherit the same." At this time William was a young man in his teens.

After this letter, and after conversations on the subject of the dispositions which the testator wished to make, the will of June, 1887, was written. This paper commences with a general clause of revocation, recites his property, makes provision for his children,

(1) 2 Curt. 653.
(2) L. R. 7 H. L. 448.
(3) 7 App. Cas. 192.
(4) [1893] P. 1.

Probate. 1893.

BEAMISH *v.* BEAMISH.

a gift for ecclesiastical purposes, appoints executors, and contains the clause which I now read, omitting superfluous words :—

"I leave to my son William Beamish my house at Muckruss, subject to the occupation of my children up to the time of their marriage, and also the sum of fifty pounds yearly rentcharge; but if he should marry without having first obtained the consent of my executors, then I direct that his occupation of my house at Muckruss shall cease, and the annuity of fifty pounds shall cease at his death and merge in the estate; but if he should marry with the consent of my executors, I bequeath to him and his heirs for ever my house at Muckruss, the fifty pounds per annum, and all the terminal annuities mentioned in this my will as they become extinct, and all the issues and profits that arise on the estate after payment of the said annuities, and after payment of all charges necessary for the due management of the estate; *but should he die unmarried, and having no male heir to possess and inherit the estate, subject to the annuities, charges, and conditions mentioned in this my will*, then I leave the estate to Marmion Beamish, the eldest son of my son Richard Beamish, M.D."

The important words in this clause are those which appear to give the estate of the testator over to Marmion the son of Richard, in case William should "die unmarried, *and having no male heir* to inherit the estate." The exact construction of these words was not discussed at the bar; and it is not necessary that I should express a judicial opinion upon the subject.

The testator himself wrote the attestation clause, and it was executed the same day. There is no question as to the original validity of this will. The questions are, has it been revoked, either altogether, or in part.

The five codicils to this will are in the handwriting of the deceased. The third, dated 24th December, 1888, alone seems of importance. It provides that in case William should marry without consent, his annuity of £50 should be reduced to £30, and that "the whole of my property and estate, subject to the conditions of my will, shall pass to my son Richard Beamish for his life, and then to his son Marmion, and his heirs for ever."

This codicil, pointing to a gift over from William only in the event of his marriage without consent, the postponement of Marmion's estate in fee, the terms of the letter of May, 1887, the evidence of Sarah Beamish that the testator was better pleased with William latterly, and spoke to him constantly as if he was to have the place, are not circumstances favourable to the allegation that the clause I have read from the will of 1887 was altered by mistake.

In October, 1891, Mr. Beamish said he wished to make a new will, and sent for the Rev. George Beamish to draw it. His friend was not at home, and the testator, a little impatient, pressed Miss Sarah Beamish to write it for him. She described the process. The will of 1887 was produced after dinner, between 4 and 5 o'clock. He said:—"Get paper and copy that." She sat down; he stood over her, took the leaves of the will, turned them over, and marked with his finger the pieces that were to be left out and the pieces that were to be put in. She said she copied from the directions he gave with his finger the passages that were to be copied. The only thing he told her was to be left out was all about the Church. He gave her directions about altering some of the annuities; all the changes, she said, were made by his direction. She had no recollection why the clause (as to which mistake is alleged) was left out. This witness also stated that before the execution of this will her father spoke of having mentioned Marmion in the will of 1887, and that he wished to have Richard's name inserted previous to Marmion's. "He did not distinctly tell me anything about William in connexion with Richard and Marmion." On cross-examination Miss Beamish said:—"Before the lamp came in her father read parts of the will, and was instructing her. He read it himself. After the lamp came in he gave her some general instructions, and turned it over and looked through it all. I finished it by myself." She also said that Richard Beamish, after her father's death, called her attention to the omission, that she was startled, and said:—"Whatever I did I did under my father's directions, and I did not think I was responsible for it." This will was duly executed.

As regards the contents of this paper, it contains a full clause of revocation, it recites the property, and seems to dispose of all, subject to a question on the clause to which I shall presently refer. It varies some of the annuities given by the will of 1887, and in lieu of the clause I have read *in extenso* from the will of 1887, contains two clauses:—

"I leave to my son William Beamish my house at Muckruss subject to the occupation of my aforesaid children up to the time of their marriage and also fifty pounds annuity but if he should marry without having first obtained the consent of my executors then I will that his occupation of my house at Muck-

Probate. 1893. BEAMISH v. BEAMISH.

russ and the annuity of fifty pounds shall cease at his death but if he should marry with consent I leave to him and his heirs for ever my house at Muckruss the fifty pounds per annum and all the terminal annuities charges mentioned in this my will then and in that case I leave and bequeath the estate subject to the annuities charges and conditions aforesaid to Marmion Beamish the eldest son of my son Richard Beamish M.D."

"Should my son John, or my son William, marry without the consent of my executors, I direct that in place of the fifty pounds per annum before mentioned in this my will for my son William, that he gets only thirty pounds per annum during his life, that the whole of my property and estate, subject to the conditions of my will before mentioned shall pass to my son Richard Beamish, Medical Doctor, during his life, and after his death to his son Marmion Beamish and his heirs for ever."

These clauses seem to me to be absurd, first in the omission of any disposition of the *corpus* of his estate, except in a gift directly to Marmion in a case not defined by the will; and, secondly, in a gift of the same *corpus*, to take effect only in the event of the marriage of William without consent, to Richard for life, and then to Marmion and his heirs.

These clauses were, I think, errors, but the certain error, as I think, was in the omission of the devise in fee to William; the exact terms on which the testator intended the gift over to Richard and Marmion do not appear to me to be proved.

The testator did not read this paper, nor was it read to him before its execution. On the following morning the testator got the will, read it, said there were mistakes in it, did not say what the mistakes were, but that he would send for the Rev. George Beamish, who knew what his wishes were.

I have stated the history and contents of this paper of October because they were the subject of much comment at the bar. They prove the intention of the testator to revoke the will of 1887, and to substitute for it another will and disposition of his property; but in the view I take of the case, it is not necessary to decide the original validity or invalidity of this will. Mr. George Beamish came to the testator, had a conversation with him, and read the will of October. The testator said he was not satisfied with it. George Beamish said it was not properly drawn up, that there were mistakes in it. He says:—"When I came to the passage, 'then and in that case I leave and bequeath the estate, subject to the annuities charges and conditions aforesaid, to Marmion

Beamish the eldest son of my son Richard Beamish, M.D.' I said, 'There has been some omission. William's position does not appear to me to be plainly stated here. I believe something has been left out; for instance, "and in case William should marry without the consent of my executors and trustees."' I knew he was very strong on that point, that if William married without the consent of the executors and trustees the estate was to go. He quite assented. I cannot give the words he used, but he quite assented to what I said, that there was an omission. I know I called his attention to the other omissions. I know one daughter was spoken of as being in this country still, whereas she had left the country; and there were some other things, too, that I have not a distinct recollection about; but I think I mentioned one or two other things to him." "Did he understand your conversation?" "Perfectly; I said then that I thought the will had better be drawn up again. He said 'Yes,' and that he would be very much obliged to me if I would draw it up. I said that in that case I should take it away with me. He said, 'Of course'; that he would be very glad, if it was not too much trouble, if I took it away and wrote it out anew for him."

Here, then, we have a discussion on the contents of the will of October between an intelligent testator and a gentleman he selected to draft this will.

The omission of the gift in the will of October of the estate to William must be attributed to accident or mistake; but George Beamish stated that nothing was said in the conversation about the estate going over to any person in case William should marry and die without issue. At this time the testator and George had both read the will of October. George Beamish took away this will, wrote the will of the 3rd November, and brought it to the testator in the afternoon of that day. It was brought to him during daylight, but signed later, when a lamp was lighting. The question of light was discussed at the hearing as bearing upon the probability of the testator having read this will.

Mr. George Beamish further deposed:—

"The deceased was in the parlour, where he usually sat. I gave him the will. I am almost certain he said, 'Is it all right,

Probate. 1893. BEAMISH v. BEAMISH.

George?' I said, 'Yes, it is all right.' He took the will into his hand. I then suggested to him that, after having read the will, it would be a good opportunity to execute it. My mother- and sister-in-law, Mrs. Crofts, and Miss Crofts, were with me; and I said it would be a good opportunity to execute it, as they could witness it. He dissented; I am not sure whether he shook his head or said, 'No.' I went into the next room, under the impression he would not execute it that day; I left him in the room with the will; he was sitting near the fire; I went into the next room, and returned to him again when I was sent for. I think I was out of the room about an hour. One of his daughters came and said I was wanted; I went in and found the testator in the room; he had the will; I could not be sure whether he had it in his hand or on the table: it was one or the other. About an hour had elapsed from the time I had left him. He said he wished to execute the will before we left; I think he said something about witnesses before I said anything; and I said Mrs. Crofts would be a very good witness; he assented. 'The witness in the last will will do; send for her'; so a girl entered the room, whom I took to be the witness to the last will. The deceased took the will, and signed it in the presence of us all; and after he signed it he made use of some form of words, 'This is my act and deed,' or, 'This is my will.' Mrs. Crofts and Hannah Tobin then signed it; he was perfectly in possession of his faculties, as well as ever he was in his life."

On cross-examination the witness said:—

"He gave me no direction to alter any disposition in the will of October beyond that general instruction to make all things right; he asked me to read it first, and then he told me to make it all right. I was not taking the will of October as instructions to put a draft will into proper legal language. It was something more than that I think; I was to supply anything I thought was left out, and correct any mistakes: for instance, that one with regard to William. I could not pledge my oath that I mentioned any other mistake."

The will of October was then handed to witness, and at counsel's request he read the clause commencing, "Should my son John or my son William marry without the consent of my executors

and trustees," down to the words, "and his heirs for ever." "I don't remember whether I called his attention to that; I think I must have called his attention to it; but I have no recollection of the fact at this moment. I don't recollect whether he gave me any direction to alter that; I think he must have given me some, because I see it is altered. I have no recollection whatever with regard to that clause; but I think he must have said something, for there is some alteration there, and I know I would make no alteration there unless I had directions to do it."

The clause in the will of October, commencing, "but if he should marry with the consent," was then read down to the words "eldest son of my son Richard Beamish, M. D." "When I read that clause I said to him, 'It appears to me that there should be put in there, "in the event of his marrying without the consent of my executors and trustees."' I pointed out to him that those words were omitted; I told him those words ought to go in. I do not think I called his attention to the fact that a similar provision was contained in the will further down. I don't remember having done so. When reading that clause I told him the words about marriage without consent should be inserted. The testator assented to what I said."

And, under these circumstances, this last will was duly executed by a competent testator. What are its contents?

1. We have a general clause of revocation of all former wills and codicils.

2. Then follow recitals of his property which he gives to his executors and trustees upon trusts.

3. The trusts are declared giving all his property to members of his family.

The will contains a clause giving testator's house at Muckruss, a rentcharge of £50, terminal annuities, &c., to William, but if he married without consent, then he gave the *whole* of his property, subject to annuities, &c., to his son Richard for life, and then to Marmion and his heirs. This clause did not give his general property to William at all, and gave it to Richard and Marmion only in the event of William's marriage without consent. There is a gap in the clause; but this clause is followed by another in the words I now read, omitting superfluous words:—

Probate. 1893. BEAMISH v. BEAMISH.

"Should my son William marry with the consent of my executors, I bequeath to him and his heirs for ever my whole estate, subject to the annuities, charges, and conditions already mentioned in this my will, and also subject to the provision to be made for my son John; but should my son William marry without consent, I will my whole estate to my son Richard Beamish during his life, and to his son Marmion Beamish after his death."

This clause gives the fee of his real estate to William if he marries with consent, and over to Richard and Marmion if William should marry without consent. In itself it is free from ambiguity, clear, precise.

Well, what is to be said against this will executed by a competent testator? It is impeached simply because the words, "should he die unmarried, and having no lawful male heir," are not interposed in this will between the gift of the fee to William, and the gift over, whereas in the will of 1887 they are interposed.

I turn to the pleadings to ascertain what are the questions in the cause raised by the parties. I have already mentioned that the executor and William Beamish, defendants in the action, allege that the will of November is the last will of the testator.

The plaintiff Marmion Beamish filed a statement of claim, in which he set out the clause of the will of 1887, containing the words, "should William die unmarried, or having no male issue, &c." He alleged that the testator did not know or approve of the omission of these words from the wills of October and November, 1891; that he executed these later wills under a mistake of fact, viz. believing that they contained these words; that he did not intend to revoke these words, and that so far as the testator's will purported to revoke this clause of the will of 1887, he did not know and approve of the said revocatory clause or the effect thereof; and then the plaintiff claimed—1. To have it declared that the said clause in the said will of 3rd June, 1887, has not been revoked. 2. To have the said will of 3rd June, 1887, and the said codicils thereto, together with the said will of 24th October, 1891, and 3rd November, 1891, admitted to probate, as together constituting the will of the said deceased. 3. In the alternative to have the said wills of 24th October, 1891, and 3rd

November, 1891, admitted to probate, omitting therefrom the revocatory clauses therein respectively contained, and to have it declared that the said will of 3rd June, 1887, is entitled to be admitted to probate as constituting, along with the said wills of the deceased, dated 24th October, 1891, and 3rd November, 1891, respectively, the last will of the deceased.

By these pleadings the plaintiff admits due execution, testamentary capacity, the absence of all fraud and undue influence; and also admits that the testator knew and approved of the contents of the will of November, 1891, *i.e.*—(1) save as regards the omission of the words introducing the gift over of the estate from William in the will of 1887; (2) save as regards the clause of revocation, so far as it purports to revoke the same words.

If there was any doubt of the testator's general knowledge and approval of the contents of this will, a pleading to that effect should have been filed, and I suggested that if counsel for the plaintiff seriously desired to raise this question, I should be asked to amend, and I was prepared, subject to what the defendants might say, to have made such an order.

But the suggestion was not adopted, and I think the plaintiff was right; for, in the absence of further evidence, I think I am bound to decide upon the existing evidence that the testator did know and approve of the contents of this will generally. No doubt there are cases in which the Court or jury may decide that a testator did not know and approve of parts of a will.

Notwithstanding the insufficiency of the pleading, this principle of proving knowledge and approval was discussed at great length at the bar, and I was pressed with the consideration that there was never a presumption *de jure* of the fact. Many authorities were cited, all of which I have considered, and I venture to state the following propositions:—

1. Knowledge and approval of a will is necessary, and must be proved.

2. The execution of a will by a competent testator is presumptive and *prima facie* proof of the fact.

3. If the competent testator has read the will, or heard it read, the presumption is strong and conclusive, *unless there are special*

Probate. 1893. BEAMISH v. BEAMISH.

circumstances attending the execution of the will: *Hastilow* v. *Stobie* (1); *Atter v. Atkinson* (2).

4. Among such special circumstances are fraud, as explained in *Fulton* v. *Andrew* (3), and which as so explained includes dereliction of duty, as illustrated in that case and *Hegarty* v. *King* (4). See also *Donnelly* v. *Broughton* (5).

5. Whether read or not, if in any way the contents of the will have been brought to the notice of the testator, the effect is the same: *Guardhouse* v. *Blackburn* (6), approved in *Harter* v. *Harter* (7).

6. Even when there has been a reading of the will, but the state of the testator was such that he could not have had an intelligent appreciation of the words, he must be taken to have known and approved of the will if the words have been *bona fide* used by a person whom he trusts to draw it up for him: *Rhodes* v. *Rhodes* (8), and also *Morrell* v. *Morrell* (9).

In *Rhodes* v. *Rhodes* (8) the question important to the decision of the present case was this: whether the words, "from and after the decease of my wife without leaving issue of our said marriage," should be omitted from probate of a will. I read from the judgment of Lord Blackburn, p. 199:—"Their Lordships think that there is no difference between the words which a testator himself uses in drawing up his will, and the words which are *bona fide* used by one whom he trusts to draw it up for him. In either case there is a great risk that words may be used which do not express the intention. There are probably very few wills in which it might not be contended that words have been so used. However this may be, the Court which has to construe the will must take the words as they find them." *Collins* v. *Elstone* (10) is to the same effect.

In the present case I should be prepared to find as a juror that the testator did actually read this will of November; but it is

(1) L. R. 1 P. & M. 64.
(2) *Ibid.* 665.
(3 L. R. 7 H. L. 448.
(4) 7 L. R. Ir. 68.
(5) [1891] A. C. 435.
(6) L. R. 1 P. & M. 116.
(7) L. R. 3 P. & M. 11.
(8) 7 App. Cas. 192.
(9) 7 P. D. 70.
(10) [1893] P. 1.

not necessary to discuss or decide the point; nor is it necessary that he should have had an intelligent approval of the words disposing of his estate to William, Richard, and Marmion. The words of this will were *bona fide* used by the man whom he trusted to draw it up for him after consultation. Therefore this will cannot be excluded from probate.

The jurisdiction of the Court, in a fit case, to omit particular words of a will from the probate cannot be questioned. This was done in *Hegarty* v. *King* (1); *Fulton* v. *Andrew* (2); *Morrell* v. *Morrell* (3); and this principle is recognised in *Rhodes* v. *Rhodes* (4), where Lord Blackburn says, at p. 198:—"It has been held that when it is sufficiently proved that the instrument comprised his will, but that from fraud, or, perhaps, from inadvertence, such as that in *In the Goods of Duane* (5), the instrument which he actually executed contained also something which was not his will; this latter part is to be rejected. And, in such a case, if this latter part is so distinct and severable from the true part that the rejection of it does not alter the construction of the true part, it has been held that, consistently with the Statute of Wills, the execution of what was shown to be the true will, and something more, may be treated as the execution of the true will alone." See also *In the Goods of Oswald* (6).

Fraud or mistake is the condition precedent for the omission of words from a valid will. Here fraud is not suggested, and I do not think mistake is "sufficiently proved"—possibility, surmise, probability, are not, in my opinion, "sufficient"; and if I am right in this view of the facts the foundation of the plaintiff's case has no substance.

Let me, however, assume that there was mistake—mistake connected with the words used in the will of 1887—introducing the gift over of William's estate in fee. Is there a remedy? What is the remedy? What is the remedy proposed by the plaintiff?

He says, firstly, "Let the Court admit the three wills to probate, and then make, in exercise of its jurisdiction as a judge of the High Court of Justice, a decree, declaring that the clause or words in

(1) 7 L. R. Ir. 68.
(2) L. R. 7 H. L. 448.
(3) 7 P. D. 70.
(4) 7 App. Cas. 198.
(5) 2 Sw. & T. 590.
(6) L. R. 3 P. & M. 163.

Probate. 1893. BEAMISH *v.* BEAMISH.

question contained in the will of 1887 have not been revoked. Counsel said truly that the Court would stultify itself if, without more, it decreed a grant of these wills to probate, having regard to the clauses of revocation in the wills of 1891. But I think I should do as wild an act if I were to contradict the grant of the Court by an inconsistent declaration in the same decree. I believe this has never been done. A declaration that a grantee shall be taken and be deemed to be trustee for another does not involve any inconsistency, a point discussed in *Betts* v. *Doughty* (1). Secondly, the plaintiff in his pleading submits that the clause of revocation in the will of 1891 should be omitted from the probate. Why? It was not introduced by fraud or even by inadvertence. It was the intention of the testator to revoke all former wills. There was no mistake connected with these words; if there was a mistake, the mistake was one of omission. Suppose I was to yield to this contention, and grant probate of the three wills, omitting the words of revocation, it would be useless to the plaintiff, for the gift of the estate to William and his heirs in the will of 1891 is inconsistent with the gift over in case William should die unmarried, and having no male heir, contained in the will of 1887. The two cannot stand together, and therefore the former is revoked without the aid of words of revocation.

It was also suggested and contended that the Court should grant probate of the clause of the will of 1887, and of the will of November, 1891, as, together, the last will of the testator. Where is the clause to be put? *Before* the will of 1891? There it is revoked by the inconsistent clause in that will. Am I to put it into the will of 1891, as part of that will, *after* the clause alleged to be a mistake? But the clause I am asked to put in omits the name of Richard altogether, and *Harter* v. *Harter* (2) seems conclusive. In that case Lord Hannen, referring to *Allen* v. *M'Pherson* (3), says, at p. 20:—"In the present case the testator intended that a clause disposing of the residue of his property should be in the will, but he left it to another person to choose the language by which his intention should be carried into effect, and he read and adopted as his own the language so chosen. Inappropriate language having

(1) 5 P. D. 26. (2) L. R. 3 P. & M. 11. (3) 1 H. L. Cas. 191.

been used, the Court is asked to remedy the mistake, not by rejecting words of which the testator is found to have been ignorant, but by modifying the language used by the draftsman, and adopted by the testator, so as to make it express the supposed intention of the testator. This is, in fact, to make a new will." And again, at p. 22, he adds:—"I entirely repudiate this mode of altering the language of a testamentary instrument, and I am, therefore, of opinion that whether the error which has undoubtedly crept into the will be one of omission or insertion, it is equally beyond the jurisdiction of this Court to correct it."

All this applies in terms to the case before this Court. I am asked to modify, by insertion or omission, or rather by the insertion and omission of words, the gift which is made by this will of his estate to his son William in fee, subject to a condition of marriage with consent.

I find that the will of 3rd November, 1891, is the last will of the testator. As in *Rhodes* v. *Rhodes* (1), I decree costs to the plaintiff out of the assets, and also one set to the defendants.

Solicitor for the plaintiff: *W. H. Corker.*
Solicitor for the defendant, William Beamish: *Fitzmaurice.*
Solicitor for the defendant, H. G. Beamish: *H. Z. Deane.*

W. L.

(1) 7 App. Cas. 192

V.-C.
1893.
June 30.

GIBBON *v.* WEXFORD INFIRMARY.

(1892. No. 381.)

Salary of surgeon of County Infirmary—Grand Jury Acts, 5 & 6 Geo. 3, c. 20 (Ir.), ss. 2, 5, 6; 45 Geo. 3, c. 111, s. 1; 6 & 7 Wm. 4, c. 116, ss. 85, 86—Payment to surgeon out of private endowment of Infirmary of sum in addition to £94 a-year salary presented for by Grand Jury.

The governors of a County Infirmary may, in the exercise of their discretion, apply funds, voluntarily subscribed, to increase the salary of the surgeon over the sum of £94 a-year, presented for by the Grand Jury, under 5 & 6 Geo. 3, c. 20 (Ir.).

Action to restrain the Governors of the County Wexford Infirmary from applying the income of £322 10*s.* 5*d.* Bank of Ireland Stock, being portion of a gift known as the Cullimore Fund, in payment of an additional salary to the surgeon of the infirmary over and above the salary presented by the Grand Jury of the county for that purpose.

The facts of the case, as proved by witnesses examined *viva voce*, were as follows:—

Dr. Boxwell, who was for many years the resident surgeon of the Wexford Infirmary, was in receipt of a salary, composed of two different parts. He was in receipt of £100 a-year (Irish), paid formerly by the Treasury, and also of the presentment of £47 made each half-year by the Grand Jury under the Grand Jury Act (6 & 7 Wm. IV. c. 116, s. 86). He died, and it became necessary to elect a successor. The salary of £100 a-year, Irish currency, payable by the Treasury, ceased on his death, and all the salary which the Governors could pay to his successor was the amount of the £94 a-year payable by presentment. They consulted, and they came to the conclusion that that was an inadequate sum to fix as the salary for their surgeon, and fixed the salary at £120 a-year. This was done at a meeting of the Governors held on the 5th September, 1890, and advertisements were published of an election to take place soon afterwards, and it was stated therein

that the salary was to be £120. On the day of election an objection was raised to this sum, as being in excess of their powers; but it was resolved that the election should proceed, and that whoever was elected should undertake to accept such salary as the Governors could lawfully pay. Dr. Hadden was then elected and gave the required undertaking. In the month of November following Mr. Adair put the Governors into possession of £1020 Consols, on the terms and for the purpose stated in his letters (see p. 31) of the 8th and 13th July, 1889. The Governors, by a minute of the 7th April, 1890, resolved that the dividends on this endowment should be applied to augment the salary of £94, payable by presentment, bringing it to about the £120 which they had fixed upon as the proper amount to be paid to the surgeon.

Serjeant Jellett, *Q. C.*, *Matheson*, *Q. C.*, and *Wakely*, for the plaintiff:—

This application of the funds of the Infirmary is *ultra vires: County Clare Infirmary* (1). The defendants would have no difficulty in getting a competent surgeon for £94, and the effect of any further payment is to divert the money so applied from the general purposes of the Infirmary. The words "support and maintenance" in section 85 of 6 & 7 Wm. 4, c. 116, do not include the salary of a surgeon. The 86th section of the same Act deals with the salary of the surgeon. There is no power to make any presentment without a certificate from the governors that the surgeon had fulfilled all his duties. Any fund given in a general way is an accretion to the funds of the Infirmary, which is to be held under the 5 & 6 Geo. 3, c. 20 (Ir.), s. 2, "in trust for the sole use and benefit of the Infirmary." These words do not include the salary of a surgeon.

The Solicitor-General (*Hemphill*, *Q.C.*) and *Samuels*, (*The Right Hon. John Atkinson*, *Q.C.*, with them), for the defendants:—

There is nothing in 5 & 6 Geo. 3, c. 20 (Ir.), to prevent the Governors applying this special fund as they did. Under the 2nd section of that Act they have power to apply gifts for the use of the

(1) Jebb's Reserved Cases, 274.

V.-C. 1893.

GIBBON v. WEXFORD INFIRMARY.

Infirmary in such manner as they shall judge proper. The Cullimore Fund is not an endowment fund properly so-called; it is a general benefaction, not directed to be applied in any particular manner. One of the objects to which this money may be properly applied is to augment the inadequate salary of a surgeon so as to provide a good and competent surgeon.

THE VICE-CHANCELLOR:—

[Having stated the facts as given above, his Lordship continued:—]

With anything the governors did in the exercise of the discretion reposed in them, it would be improper for me to attempt to interfere, except it was shown either that the transaction was tainted by fraud, or that the matter proposed to be done was *ultra vires*. As for fraud in this case, it cannot enter into the question, and can be put out of the way by merely stating it. It was not suggested that the fixing the salary of £120 a-year was a job for the purpose of putting an additional salary into the pocket of the new officer about to be appointed. It was a resolution altogether independent of the result of the election. The plaintiff himself stated, through his counsel, the high estimation in which these gentlemen are held.

The question then merely narrows itself to one simply of law, whether it was *ultra vires*, namely, whether they had any right to devote any portion of this money to supplement the salary of £94 a-year that was paid to the surgeon in the first place. It would take some very clear and strong language to show me that this was not within the discretion of this governing body. It is not in any part derived from public funds, either provided by the Treasury, or by the Grand Jury. That is not proposed to be dealt with by the Governors, but there is a fund provided by this Cullimore donation which enabled them to make up the difference between £120 that they thought they should give, and the £94 they had to give; and it is to restrain the application of it in that way that the present action has been brought.

Now it was sought I think mainly to rest this case upon the 2nd sect. of 5 & 6 Geo. 3, c. 20 (Ir.). That section is the incorporating section, which constitutes a body of governors, and empowers

them to take real property to a limited amount, and also to take "gifts, grants, contributions, and benefactions to any amount in personal property, in trust for the sole use and benefit of the Infirmary of the particular county to which such benefactions shall be made," and empowers them "to employ the same for the use of the said Infirmary in such manner as they shall judge proper, unless the donor shall direct the manner of applying such benefactions, in which case the directions of the donor shall be observed." I do not think anything can be clearer than the words of that section. It gives a full and complete power to the body entrusted with them as to the application of voluntary gifts. They were to apply such, provided the application was for the benefit of the hospital. Beyond that there is no limitation; but, on the contrary, I think it would be going a great way, indeed, if I were to be called upon to say that these gentlemen had not the power under that section to employ a portion, or the entire, if necessary, of the income of this Cullimore Fund, for what they consider, in the exercise of their discretion, to be material for the benefit of the hospital. They are the persons to form an opinion on it, and not I. Can it be said that increasing a salary—cut down from £180 to £94, by the death of Dr. Boxwell—by the moderate amount of the difference between £94, and £120 can be held to be an infringement of the statute?

The 5 & 6 Geo. 3, c. 20 (Ir.), in sect. 5, provided and fixed the salary of the surgeon at £100 a-year, paid out of the Treasury. The second portion of this section provides a fund by Grand Jury presentment, for "providing food, medicines, and other necessaries for the patients, in repairing the respective buildings and the furniture thereof, and in paying the rents of the Infirmary." Now, these are two separate funds dedicated to two separate purposes—one a Treasury fund for payment of the salary of the surgeon, and the second for the support and maintenance of the institution, and for the repairs of the house. If it had been attempted by the governors to interfere with the latter of these funds, supposing they were both in existence, for the purpose of making an increase in the salary of the surgeon beyond what the statute pointed out, I should undoubtedly say that they had no authority to do so; but there is no idea on their part to interfere in any way with that

V.-C. 1893.

GIBBON v. WEXFORD INFIRMARY.

fund, nor could they do it. The question is whether this section in any way interferes with the control which they otherwise would have over the voluntary contribution of individuals.

Now, coming to the 45 Geo. 3, c. 111, that does nothing more than increase the amount which the Grand Jury presentments were limited to by the Act of 5 & 6 Geo. 3, for providing food, medicines, and other necessaries, or what is generally called the support and maintenance of the hospital, and is quite distinct from the payment of the surgeon's salary. The amount under this section was raised to £500. There would be no power to apply any of the money provided for by these Acts to supplement the salary of the surgeon. Then comes the Grand Jury Act, and it follows very much the same lines. By the 85th section it raised the county presentment very largely indeed. It gives power to present £700 a-year at each assize, and this is also intended for the support and maintenance of the Infirmary in the same sense as under the 6th section of 5 & 6 Geo. 3 and the 1st section of the 45 Geo. 3. Out of that they would have no power to pay any increase in the salary of the surgeon, because the 86th section of the Grand Jury Act provides for the payment of the surgeon. I am certainly at a loss to see that it is in violation of the enactment that the surgeon should receive, or the governing body should pay, anything more from funds other than the Act of Parliament provides. Section 86 of the Grand Jury Act provides merely that two sums of £47 each year should be the amount presented for by the county, but it leaves the governors perfectly free and open to employ contributions from any one who chooses to give them, for the purpose of increasing the salary of the surgeon. Suppose this fund had been paid to the governors for the express purpose of increasing the salary of the surgeon, would it be illegal for the governors so to apply it? Certainly not.

I must then consider whether there is anything in the words of the gift itself that prevents the governors applying this fund in the way they have done.

This turns entirely on the two letters of Mr. Adair, who was entrusted with the management of this fund by the will, I suppose, of Mr. Daniel Cullimore. The first letter of the 8th July

1889, says:—"The death of Mr. Cullimore, since I had last the pleasure of hearing from you, has enabled me to transfer a sum of £1000—say £1020, Government 2¾ per cent. stock—to be added to the endowment fund of the County Wexford Infirmary, which will afford me great pleasure doing, if you will kindly inform me the names and address of the Endowment Trustees of this valuable institution, who will sign a proper receipt therefor as above, and to be recorded in your books "In memoriam of Daniel Cullimore, Esq., per S. F. Adair,'" Now, is there anything in that to prevent the money being so applied? It is stated, and rightly stated, that a meaning probably was attached to the words Endowment Fund of the County Wexford Infirmary. I take it, as it is an endowment fund, that the capital of the fund is to be preserved, untouched, and to be permanently for the benefit of the Institution, but the income remains, and there is nothing whatever in that letter of Mr. Adair as to how the income is to be applied. Of course, it is for the permanent benefit of the County Wexford Infirmary that the capital sum has been given, but there is no specific or detailed direction as to how the income is to be applied. The second letter is to the same effect and open to the same observations as I made on the letter of the 8th July. It leaves the interest untouched, and leaves that in the discretion of the Governors. I see nothing in that application inconsistent with the terms upon which they received the gift from Mr. Adair.

I have not the slightest doubt that the suit was instituted with good motives, but that does not prevent me dealing with it as I should with every other action that comes before me, and dismissing it with costs, at the same time pointing out to the governors that they must correct the mistake that they made in increasing the salary beyond £120 a-year. That is not the question now before me, nor was it raised until nearly at the close of the case, and it was not disputed by anyone.

Solicitor for the plaintiff: *R. W. Elyce.*
Solicitor for the defendants: *Michael T. O'Connor.*

T. H. M.

M. R.
1893.

Feb. 18, 22, 23.
March 30.

PALMER *v.* ORPEN.

(1892. No. 379.)

Will—Construction—"Then" living—To what period referred—Last antecedent—Ascertainment of class.

A testator devised certain lands in the following terms:—"To my eldest son John and his assigns during his life, and after his death to such one or more of his children or other issue born in his lifetime, and his, her, and their executors and administrators, at such time and times, in such shares and proportions, and for such estate or estates, and charged with such sum or sums of money for the others or other of them, as my said son shall, by deed or will, appoint; and in default of appointment, I give and bequeath the same to and amongst all his children who shall be living at his decease, or who shall have died leaving issue then living, and their respective administrators and executors, in equal shares, as tenants in common for ever. And in case my said son shall leave no issue living at the time of his decease, then, subject as aforesaid, I give, devise, and bequeath the same to my second son Richard, and his assigns during his life"; and then followed the same provisions and limitations in favour of the children or other issue of Richard, born in his lifetime, as those contained in the devise in remainder after the death of the eldest son.

In the event of the death of Richard without lawful issue, the lands were devised in similar terms to the testator's third son Emanuel, for his life, with the same provisions and limitations in favour of his children or other issue born in his lifetime; and in the event of the death of Emanuel without issue, the lands were devised in similar terms to the testator's fourth son Robert, for his life, with the same provisions and limitations in favour of his children or other issue born in his lifetime. The will then provided:—"And in case my said son Robert shall leave no issue living at the time of his death, then, subject as aforesaid, I give and bequeath the same to my daughters who shall then be living, or who shall have died leaving issue then living, and their respective executors and administrators, in equal shares, as tenants in common for ever."

The four sons of the testator mentioned in the will survived him. Robert, the fourth son, died in 1853, unmarried, and without issue; and the third son, Emanuel, died in the same year, also unmarried and without issue. John, the eldest son, died in 1862, without issue, and having survived his wife. Richard, the surviving son of the testator, died in 1892, unmarried and without issue:—

Held, that the daughters of the testator who were to take as tenants in

common, under the provisions of the will, were to be ascertained as a class on the death of Robert in 1853, and not on the death of Richard in 1892, when all the previous limitations in favour of the sons of the testator were exhausted.

Archer v. *Jegon* (8 Sim. 446) considered and followed.

The general rule of construction in almost all questions arising upon wills is first to ascertain by an examination of the entire will what is the natural and grammatical meaning of the language used by a testator, subject to this, that if the law places a certain signification upon the words he has used, they must, in the absence of a controlling context, be construed in that sense, no matter how he may possibly have meant them to be understood; and having thus arrived at the meaning of the words, they must be so applied, unless so to do would lead to some palpable absurdity, or violate some rule of law.

ACTION.

By his will, dated 14th August, 1847, the Rev. John Emanuel Orpen devised certain lands in the following terms:—"To my eldest son John Herbert Orpen, and his assigns, during his life, and after his death to such one or more of his children, or other issue born in his lifetime, and his, her, or their executors and administrators, at such time and times, in such shares and proportions, and for such estate or estates, and charged with such sum or sums of money for the others or other of them as my said son shall by deed or will appoint; and in default of such appointment, I give and bequeath the same to and amongst all his children who shall be living at his decease, or who shall have died leaving issue then living, and their respective administrators and executors, in equal shares, as tenants in common for ever. And in case my said son shall leave no issue living at the time of his decease, then, subject as aforesaid, I give, devise, and bequeath the same to my second son Richard Ashe Orpen, and his assigns, during his life, and after his decease, to such one or more of his children or other issue born in his lifetime, and his, her, or their executors and administrators at such time and times, and in such shares and proportions, and for such estate or estates, and charged with such sum or sums of money for the others or other of them as my said son Richard Ashe Orpen shall by deed or will appoint; and in default of such appointment I give and bequeath the same to and among all his children who shall be living at his decease, or shall have died leaving issue then living, and their respective executors and

M. R. 1893. PALMER *v.* ORPEN.

administrators, in equal shares, as tenants in common for ever. And in case my said son Richard Ashe Orpen shall leave no lawful issue at the time of his death, then, subject as aforesaid, I give and bequeath the same to my third son Emanuel Henry Orpen, and his assigns, during his life, and after his decease to such one or more of his children or other issue born in his lifetime, at such time and times, in such shares and proportions and for such estate or estates, and charged with such sum or sums of money for the others or other of them as my said son Emanuel Henry Orpen shall by deed or will appoint; and in default of such appointment, I give and bequeath the same to and among his children who shall be living at his decease, or shall have died leaving issue then living, and their respective executors and administrators, as tenants in common for ever. And in case my said son Emanuel Henry Orpen shall leave no lawful issue living at the time of his death, then, subject as aforesaid, I give and bequeath the same to my fourth son Robert Hutchinson Orpen, and his assigns, during his life, and after his decease to such one or more of his children or other issue born in his lifetime, at such time and times, in such shares and proportions, and for such estate or estates, and charged with such sums or sum of money for the others or other of them as he my said son Robert Hutchinson Orpen shall by deed or will appoint; and in default of such appointment, I give and bequeath the same to and among all his children who shall be living at his decease, or shall have died leaving issue then living, and their respective executors and administrators, in equal shares, as tenants in common for ever. And in case my said son Robert Hutchinson Orpen shall leave no issue living at the time of his death, then, subject as aforesaid, I give and bequeath the same to my daughters who shall then be living, or who shall have died leaving issue then living, and their respective executors and administrators, in equal shares, as tenants in common for ever."

There were other lands devised by the will to the testator's children, but in a different order of succession.

The testator died in June, 1852, and probate of his will was duly granted to the executors in July of the same year. He left four sons surviving, viz. John Herbert Orpen, Richard Ashe

Orpen, Emanuel Henry Orpen, and Robert Hutchinson Orpen; and three daughters, Hannah Hutchinson Orpen, Margaret Lucy Orpen who married the plaintiff Thomas Palmer, and Fanny Sophia Orpen who subsequently married William Smith.

Robert Hutchinson Orpen, the fourth son of the testator, died in 1853, unmarried, and without issue; and Emanuel Henry Orpen died in the same year, also unmarried, and without issue.

John Herbert Orpen, the eldest son of the testator, died in 1862, without issue, and having survived his wife.

Richard Ashe Orpen, the surviving son of the testator, died in 1892, unmarried, and without issue.

Hannah Hutchinson Orpen died in October, 1878, unmarried; and Frances Sophia Smith died on the 6th April, 1883, having survived her husband, and without issue.

The third daughter, Margaret Lucy Palmer, survived Richard Ashe Orpen, and was one of the plaintiffs in the action.

The question which arose for decision in the case in the events that happened was whether, under the terms of the limitations in the testator's will, the time for the ascertainment of the daughters, who were to take as tenants in common, as a class, was on the death of Robert Hutchinson Orpen, or on the death of the survivor of the brothers, Richard Ashe Orpen. The plaintiff Margaret Lucy Palmer claimed to be entitled to all the lands so devised, as being the only daughter of the testator living at the death of Richard Ashe Orpen.

The defendant claimed to be entitled to two-thirds of the lands so devised, as being entitled to the shares of Hannah Hutchinson Orpen and Frances Sophia Smith, under the dispositions of their respective wills, which shares it was contended became vested in them respectively on the death of Robert Hutchinson Orpen in 1853.

Sergeant Jellett, Q.C., Ronan, Q.C. (with them *Martin Burke, Q.C.*, and *Conner*), for the plaintiffs:—

The plaintiff, Mrs. Palmer, as the only daughter who survived Richard Ashe Orpen, is entitled to the lands devised on the construction of the clause in question. Under the general scheme of the will it is plain that the real estate is not intended to pass to

M. R. 1893. PALMER *v.* ORPEN.

the female issue till all the issue of all the sons is exhausted, and the intention of a testator, when it can be collected from the whole will with reasonable certainty, will be given effect to even against the literal sense of particular words and expressions: Hawkins on Wills, p. 5. In limitations of estates and framing contingencies, "then" is a word of reference. It relates to the determination of the first limitation in the estate where the contingency arises: *Beauclerk* v. *Dormer* (1). See judgment of Lord Brougham in *Campbell* v. *Harding* (2). From the line of limitations in the will, it is clear that the words "then living" are to be taken in connexion with the previous limitations, and it is clear the testator meant to have a complete series of limitations, under which each son and his issue were to take, and that nothing was to go over to the daughters until such issue was exhausted, and when you come to deal with the ultimate remainder, it is to be ascertained by reference to the whole scheme of the will. "Then" in this case properly interpreted refers to the exhaustion of the previous limitations, and would do so, having regard to the scheme of the will, even if this were a forced construction.

Bacon, V.-C., says, in *Redfern* v. *Bryning* (3):—"I do not hesitate in the slightest degree, therefore, to adopt the rule which Vice-Chancellor Hall expressed in *Sweeting* v. *Prideaux* (4), that the testator must necessarily have meant what the mere letter of the will does not express. I think, therefore, that the will ought to be read as if it was expressed in the terms suggested in the statement of claim": *Moorhouse* v. *Wainhouse* (5); *Luddington* v. *Kime* (6); *Davis* v. *Norton* (7); *Doe* v. *Shipphard* (8); *Edgington's Trusts* (9); *Cooper* v. *Mac Donald* (10).

The note in Jarman on Wills (4th ed.), p. 851, is misleading. *Archer* v. *Jegon* (11) is a plain case, and is the only case which attempts to support the note in Jarman; *In re Wollaston's Settlement* (12). There is no such rule that in cases like this the word

(1) 2 Atk. 308.
(2) 2 Russ. & Myl. 410.
(3) 6 Ch. Div. 138.
(4) 2 Ch. Div. 413.
(5) 1 Wm. Bl. 638.
(6) 1 Ld. Raymond, 203.
(7) 2 P. Wms. 390.
(8) 1 Doug. 75.
(9) 3 Drew. 202.
(10) L. R. 16 Eq. 258.
(11) 8 Sim. 446.
(12) 27 Beav. 642.

"then" must refer to the period of the death of the person last named, and not to the period of the determination of the several prior interests: *Hetherington* v. *Oakman* (1); *In re Deighton's Settled Estates* (2); *Olney* v. *Bates* (3); *Selby* v. *Whittaker* (4); *Harvey* v. *Harvey* (5); *Widdicombe* v. *Muller* (6); *Wheeler* v. *Addams* (7); *Gill* v. *Barrett* (8).

Twigg, Q.C., *Meredith, Q.C.*, and *Oulton*, for the defendant:—

There is no difficulty whatever on the construction of the will. We admit that the daughters are not to take till the line of sons is exhausted, but they are ascertained as a class on the death of Robert Hutchinson Orpen.

The Court will not alter the plain words of a will merely for the purpose of symmetry; here the period for the ascertainment of the class is fixed in clear and unmistakeable language. *Then* in the phrase "who shall then be living," is to be referred to the last antecedent: *Archer* v. *Jegon* (9); *In re Wollaston's Settlement* (10). In *Grant* v. *Heysham* (11) all the cases are discussed, and *Archer* v. *Jegon* (9) and the cases following it are recognized as law: *Powis* v. *Matthews* (12). In every case where a similar expression has been held to refer to something else than the last antecedent there has been some context to control the principle laid down in these cases, or its adoption would have led to an absurdity or a contradiction of the manifest intention of a testator. It cannot be contended that any absurd result would follow the adoption of the recognized principle in this case. The other side seek to import words which do not exist into the will. Our contention rests on its plain grammatical construction. *Beauclerk* v. *Dormer* (13) does not affect the principle of *Archer* v. *Jegon* (9), and has no application to the present case. It is no authority for the proposition that the word "then" in a context like the present is never an adverb of time.

(1) 2 Y. & C. C. C. 299.
(2) 2 Ch. Div. 783.
(3) 3 Drew. 319.
(4) 6 Ch. Div. 239.
(5) 3 Jur. 949.
(6) 1 Drew. 443.
(7) 17 Beav. 417.
(8) 29 Beav. 372.
(9) 8 Sim. 446.
(10) 27 Beav. 642, 644.
(11) 57 L. T. (N. S.) 828.
(12) 11 W. R. 662.
(13) 2 Atk. 308.

M. R. 1893.

PALMER v. ORPEN.

Bullock v. *Downes* (1) would have been decided differently if it had not been held that the second "then" in the limitation expressly referred to the time of the testator's death.

In *Grant* v. *Heysham* (2) the summary contained in the note in Jarman, 4th edition, p. 851, is approved of by Lindley, L.J. In that case Lopes, L.J., says, in reference to the will in question:— "The construction that the word 'then' referred to the period when the trust was to take effect would, no doubt, make a more intelligible testamentary disposition of his property by the testator, looking at the events that have happened. But the Court is not justified in doing that. We are bound to construe the will according to the ordinary grammatical meaning of the words, unless there is enough in the will to control that meaning."

The following cases were also referred to: *Day* v. *Day* (3); *Heasman* v. *Pearse* (4); *Widdicombe* v. *Muller* (5).

Martin Burke, Q.C., in reply.

March 30.

THE MASTER OF THE ROLLS:—

The rule of construction in this, as in almost every other question arising upon wills, is first to ascertain by an examination of the entire will what is the natural and grammatical meaning of the language used by the testator, subject to this, that if the law places a certain signification upon the words he has used, they must, in the absence of a controlling context, be construed in that sense, no matter how he may possibly have meant them to be understood; and having thus arrived at the meaning of the words, they must be so applied, unless so to do would lead to some palpable absurdity, or violate some rule of law.

In the present case neither result leads to any absurdity, or transgresses any rule of law. It is not more absurd for a testator to leave property to his daughters who shall be alive at the death of their brother Robert, than to those who shall be alive at the death of their brother Richard, nor is it illegal to do either the one or the other. The question then is, what did the testator mean,

(1) 9 H. L. Cas. 1.
(2) 57 L. T. (N. S.) 828.
(3) Ir. R. 4 Eq. 385.
(4) L. R. 7 Ch. 275, 660.
(5) 1 Drew. 443.

subject to the qualification which arises where the law attaches a peculiar meaning to particular words, or words in particular contexts, as is said to be the case here in regard to the word "*then*"?

Leaving this last point aside for the present, and endeavouring to see what is the grammatical meaning of the clause in question, the matter appears to me almost too plain for argument. Whether the testator formed any expectation as to the order in which his sons would die or not (and from the devises of the other estates in different order it is almost certain he did not), he at least knew that they would all die sometime; and in respect to the ultimate succession to the different estates or portions of his property, it may be improbable that he contemplated what might be a different class of his daughters succeeding to each. That is really the strongest ground for holding, as matter of construction and apart from any rule of law, that he must have meant all the estates to go over at the same time to the same daughters. But it is only an argument founded on probability, and cannot control the words. What does the testator say? "And in case my son Robert Hutchinson Orpen shall leave no issue living at the time of his death, *then* . . . I give and bequeath the same to my daughters who shall *then* be living or who shall have died leaving issue then living." "Who shall be living"—when? Plainly "at the time of his death." The first "then" is not an adverb of time, but means "in that case." The second "then" is and can only be an adverb of time, and must be equivalent to "at that time." Read it so, substituting "at that time" for "then." [His Lordship referred to the will.] If this were not a legal document but a passage from a business letter or a literary work, whatever might be thought of the style, the meaning could not for a moment admit of question. And if it could, a glance at the clause immediately preceding would remove all possibility of doubt. That clause deals with the "children of Robert Hutchinson Orpen who shall be living at his decease or shall have died leaving issue." There the word "then" would not have answered, as there was no immediate antecedent, and so the phrase had to be expanded. But it is plain the two classes are meant to be ascertained at the same time.

But here comes in the question so energetically argued for the

M. R. 1893. PALMER v. ORPEN.

plaintiffs. It is said that the word "then," used as an adverb of time, must, in a context like the present, refer not to the last antecedent but to a different period not grammatically indicated, namely, the time, whatever it may be, at which all the limitations, vested or contingent, before the gift to the daughters, have been exhausted, and the property vests in possession; that is, in the events which happened, not the death of Robert, but the death of Richard, which occurred in 1892. This was put not as a matter of *prima facie* probability, resting upon convenience or presumed intention, but as a rule of law, so strong as to necessitate the doing of actual violence to the grammar of the clause, if the result cannot otherwise be attained. I have read all the authorities cited to prove the existence of this alleged rule, and am perfectly clear no such rule exists. Where property, real or personal, is the subject of a series of limitations, whether vested or contingent, by way of remainder, it is natural to expect that the ultimate estate will not take effect till the expiration of all the prior interests, in whatever order they may happen to come; and further, as, until that event, namely, the failure of prior limitations, the persons ultimately entitled, if they constitute a class, cannot themselves actually enjoy the property, we may be prepared to find that in many cases the ascertainment of the class will be postponed till that event has happened. But there is no rule whatever to this effect, and indeed the presumption to which the Court always leans in favour of early vesting, is against it. The rule is that which I have mentioned already, that the meaning of the language as it stands is to be arrived at and carried out where the object is not illegal, and when no palpable absurdity arises.

Archer v. *Jegon* (1) indeed admittedly, if law, is in point with the present case. There the words of the will of Joseph Moser, after giving a life estate in certain stock to his sister Elizabeth, the wife of John Graham, for her sole and separate use, were as follows:—"And from and after the death of my said sister, then upon further trust to pay the dividends of the stock to the said J. Graham, for his life, and from and immediately after his decease, I give and bequeath the said stock, and the interests and dividends thereof, unto my nephews and nieces, the children of my said sister, who shall then be living."

(1) 8 Sim. 446.

The testator died in 1819, and John Graham died shortly afterwards, leaving a son and four daughters surviving. Mrs. Graham died in 1836, and one of the daughters died in her lifetime. The question was whether that daughter took a vested interest in one-fifth of the stock, or whether the fund was wholly divisible amongst the four children who survived their mother; and the Vice-Chancellor said:—"The safest rule in construing wills is to take the words according to their ordinary meaning, unless there is something else in the will which shows that they were not meant to be so taken. It is possible that the testator may have meant that those children only should take who should be living at the death of the survivor of Mr. and Mrs. Graham; but he has not said so." He then quotes the will at length, and says, "There the word *then*, necessarily refers to the antecedent 'after his decease'"; and it was held that the representatives of the deceased daughter were entitled to one-fifth of the fund. In *Wollaston's Settlement* (1) the word "then" was held to refer to the last antecedent, though, no doubt, so holding led to a postponement of vesting.

In *Hetherington* v. *Oakman* (2) "then" was referred to the period of distribution, but by a construction which made the period of distribution the last antecedent. The will is a very obscure one. The residuary clause there was "on her decease," that is the decease of the wife, "my said daughter being dead before the age of twenty-one, I devise and bequeath to my wife the house in Scotch-street, Whitehaven, her heirs and assigns for ever; *then* in further trust to pay the produce of my residuary estate and effects unto and among my nephews and nieces, the children of my sister Ann, to be divided among them and such of them as shall be then living, share and share alike."

The question was as to what period "then living" was to be referred to, and it was held to refer to the period of distribution but from the language of the clause. The Vice-Chancellor says:—"It is impossible, upon any reasonable construction, to read the word 'and' in the clause, 'and such of them,' &c., otherwise than as 'or.' The question is, what is the meaning of the word 'then'?

(1) 27 Beav. 642. (2) 2 Y. & C. C. C. 299.

M. R. 1893.

PALMER v. ORPEN.

It appears to me to refer to the period at which the gift was to take effect in possession. Was that period the death of the daughter or the death of the wife? I am of opinion that nothing was to be done in the way of distribution till after the death of the wife, and that, as there was one nephew only living at the death of the wife, that nephew takes the whole residuary property."

Gill v. *Barrett* (1) was very much relied on as an exception to the general rule I referred to. "I give to my sons, Phineas and John," says the testator in that case, "in equal shares my estate at Cowlaughton during the life of Phineas, and until his youngest child attains the age of twenty-one years, subject to the payment of £15 per annum to my dear wife Mary, in lieu of dower or thirds at common law. Upon the death of my son Phineas, and on the attainment of his youngest child to the age of twenty-one years, I order and direct my executors and trustees to sell my said estate at Cowlaughton by public auction to the highest bidder, and to divide the money arising from such sale into two parts or shares, one half to my said son John and his heirs, and the other half among the *then* living children of my said son Phineas, share and share alike. But in case of my said son John's death, without lawful issue, before the said division takes place, then I give his half-share to and among all my then living grandchildren, share and share alike."

The Master of the Rolls says:—"I think it clear that the words in question mean the grandchildren living at the period of division. I assent to the cases stated, which hold that the word 'then' refers to the last antecedent; but here it refers to the division, whenever that took place. The testator says that, in case of 'John's death without lawful issue before the said division takes place, then I give his half-share to and among all my then living grandchildren,' that is, to those living at the time of the division, or, at the death of Phineas. The prior 'then' is not an adverb of time, but points to the event, viz. the death without issue before the division. In the expression 'then living,' the word 'then' is an adverb of time, and refers to the period of

(1) 29 Beav. 372.

division. I have no doubt that it means the grandchildren living at the time of the division, and I must therefore overrule the demurrer, with costs."

Beauclerk v. *Dormer* (1) was relied on as being conclusive that "then" in limitations of estates is never an adverb of time, but Lord Hardwicke never meant to lay down anything of the sort. No doubt, the Chancellor does say in this case, "The first question is, whether there is any particular circumstance in this case that can confine the words to a *dying without issue at the time of Miss Dormer's death:* the cases which have been cited are most properly applicable to this question. I am of opinion, that though there are some words which look this way, yet, in point of law, they will not admit of this construction. The word *then*, indeed, first occurred to me; but I do not recollect any case that has turned upon this word, merely, for *then* in the grammatical sense, is an adverb of time; but in limitations of estates and framing contingencies, it is a word of reference, and relates to the determination of the first limitation in the estate where the contingency arises." And that, of course, was applicable to the context before the Court; but if Lord Hardwicke meant that "then" could never, in the limitations of estates, be an adverb of time, such a statement is directly contrary to all the authorities.

In *Edgington's Trusts* (2) the language of the settlement was admittedly strained. The Vice-Chancellor says:—"It appears to me that this settlement, although very inartificially drawn, is sufficiently explicit. It purports to be executed for making a provision for the intended wife, and the issue of the intended marriage. And although, as I have said, it is most clumsily drawn, still this intention is, I think, sufficiently clear, that no children of the marriage should be excluded from participation in the fund by reason of not being born before a particular period, but some are intended to be excluded by reason of their dying before a particular period. The question is, in what sense the word 'then' is to be construed, to what period it refers? It appears to me that the parties had in view the period when,

(1) 2 Atk. 308. (2) 3 Drew. 202.

M. R. 1893. PALMER v. ORPEN.

under the limitations, and having regard to the circumstances which might happen, the fund would be distributable, and that intention they have expressed, though very clumsily. It has correctly been observed, that if the meaning of the word 'then' is limited to the period of the bankruptcy, this might happen; that if the husband was bankrupt within six months of the marriage, whatever number of children he might have afterwards, every one of them would be excluded under all possible circumstances. That is not merely an absurd intention to impute, but I do not think it is consistent with the fair construction of the language. But the parties clearly did mean to exclude some children in certain events, even although they should have attained twenty-one or married and left issue. It appears to me that the word 'then' refers to the period when, under the limitations, by the determination of the prior interest, the fund would be divisible. If the wife survived the husband, then the prior interest would not determine till her death. If she died in the lifetime of the husband, then the prior interest would not determine till the death or bankruptcy of the husband. Now, it is contended that by the limitation over in case of the wife dying in the lifetime of the husband, then, after his bankruptcy no child coming into *esse* should take; but I think I can put a rational construction on that sentence, by holding that the words 'then living' refer to the period at which the prior life interest would determine, that the fund became divisible in the events which happened at the death of the wife, and that all the children living at the death of the wife are entitled."

That case was decided on the view that any other construction would be a palpable absurdity. *Olney* v. *Bates* (1), reported in the same volume, and before the same judge, shows that he had no intention to depart from the general rule of construction; and the case is an illustration of the strictness with which the Courts follow the grammatical meaning of the words of a will. The will there, after a gift of the testator's real estate to his wife for life, or during widowhood, provided for the sale of the property after her death, and a division of the proceeds thereof "equally between all his children, but if

(1) 3 Drew. 319.

any of them should be then deceased, leaving lawful issue surviving them, then the respective share or shares of such deceased child or children, should be given to such issue, if more than one, in equal proportions." The testator's wife died during his lifetime, and Mrs. Foster, one of the children, survived the wife, but also died during the testator's lifetime, leaving a husband and children, and it was held that her share went to the surviving children of the testator, and not to her issue, nor to her personal representatives, under the Wills Act.

The Vice-Chancellor, says:—"In this case my anxious wish would be to come to a conclusion in favour either of the children of Mrs. Foster, or of her personal representatives; but I cannot consistently, with a right construction of the will, come to the former conclusion; nor can I, under the Act of Parliament, give it to the representatives." He refers to the will, and says:—"Now, if the will stopped at the part immediately before the proviso, there could be no question on the construction. If the will had stopped at the first devise, the effect would be this (independently of the question arising on the statute), to give to the children living at the death of the testator. Then comes the clause, 'but if any of them,' &c. If the question turned on the word *them*, no doubt that would apply to the testator's children generally; but it is, if any of them should be *then* dead; the question is, what is the meaning of the word *then*? to what period does it apply? Of course the testator contemplated his widow surviving him, and when he devises his estate to his widow for life, and directs a sale after her death, the word *then* is, I think, to be referred to the death of the wife. Then when he provides that if any of his children shall be *then* dead, it can only apply to children who should predecease the wife. If the widow had survived him, all the children living at his death would be entitled, and any of those predeceasing him would take nothing. But if any surviving him were dead at the death of the widow, leaving issue, those issue would take. But if the children dying before the testator survived the wife, their issue could not take. I think, therefore, that, on the construction of the will itself, Mrs. Foster having survived the wife, her issue cannot take anything," and he decides in favour of the grammatical construction of the will.

M. R. 1893.

PALMER v. ORPEN.

And in *Selby* v. *Whittaker* (1), in a case, the facts of which have no direct bearing on that now before me, Baggallay, L. J., discusses this alleged rule. He says (p. 250) that "there is no rule that where there is a gift to a class upon a contingent event, the time of the happening of the contingency determines the individuals composing the class. There is no such general rule, but at the same time the circumstance that the gift is only to take effect upon the happening of a particular contingency is a circumstance to be taken into consideration, in combination with other indications of the testator's intention to be found in other parts of his will. I think that in the present case such an indication is to be found in the fact that the gift itself is to the child or children or other lineal descendants of the testator's daughter to take *per stirpes*."

Grant v. *Heysham* (2) is an express authority that *Archer* v. *Jegon* (3) is law; and it contains a statement of the opinion of Lindley, L.J., that the rule in Jarman is correct. He says:— "Anybody reading this will will see that it is difficult, if not impossible, to put the construction contended for by the appellants on the words without a little straining. It is not a natural, but a forced construction. That being so, one looks a little further to see whether there is any principle upon which one can force words and put upon them a construction which they do not naturally bear. Looking at the authorities, they are against any such forcing. In Jarman on Wills, 4th ed., vol. i., p. 851, the cases on this point are very neatly summed up. It is stated in the note"—that is, the note which has been so much the subject of discussion—"'Here it may be noticed that where (as often occurs) life interests are bequeathed to several persons in succession, terminating with a gift to children, or any other class of objects then living, the word 'then' is held to point to the period of the death of the person last named (whether he is or is not the survivor of the several legatees for life), and is not construed as referring to the period of determination of the several prior interests.' Then he refers to *Archer* v. *Jegon* (3), and says:— 'The construction is the same, though the person last-named die

(1) 6 Ch. Div. 239. (2) 57 L. T. (N. S.) 828. (3) 8 Sim. 446.

in the testator's lifetime. That is the effect of *Olney* v. *Bates* (1).' Then he refers to a string of cases, and the note goes on, 'Compare *Gaskell* v. *Holmes* (2)' and other cases, 'where if "then" had been referred to the last antecedent, a life estate just before coming to the widow would have been defeated.' That sums up the authorities, and is in accordance with that which would be the conclusion arrived at simply by looking at the words themselves. It was contended, and that was the best contention that could be put forward, that the word 'then' means when the trust arises; but, when we look at the will, although the words 'upon trust' are introduced, you do not find any fresh period of time introduced. The word 'then' refers to some period of time; and whether you give effect to the words 'upon trust' or treat them as surplusage, the only period of time referred to is the death of the aunt. Whether we look at the will or the authorities, the result is the same, and I think the decision appealed from was right."

And *Archer* v. *Jegon* (3) is also recognized and acted on in *Powis* v. *Matthews* (4), where it is adopted as the ground for the decision.

I am asked to set up a rule of construction which the Court of Appeal in England say does not exist, and to hold that *Archer* v. *Jegon* (3) is no longer law, a case which the Court of Appeal have ratified and adopted.

Solicitor for the plaintiffs: *C. Ashe.*

Solicitors for the defendant: *Orpen & Sweeny.*

R. W. L.

(1) 3 Drew. 319.
(2) 3 Ha. 138.
(3) 8 Sim. 446.
(4) 11 W. R. 662.

M. R.
1893.
May 11, 12.

KING AND ANOTHER *v.* LORD ARDILAUN.

(1892. No. 80.)

Grand Jury cess—Unoccupied premises—Presentment—Liability of owner in fee—Arrears recoverable—"Charge" upon lands—Action at law—Person previously liable—6 & 7 Wm. 4, c. 116, s. 153—19 & 20 Vict. c. 63, s. 7.

The owner in fee of premises which are rateable and rated for county cess is liable for arrears of rates struck whilst he was not in occupation, and whilst the premises were, in fact, unoccupied, he having afterwards gone into occupation, and so continuing at the time when one or more subsequent rates had been struck, and when the arrears were represented. Such liability is not limited to two years' arrears from the original presentment.

In such case the owner in fee is primarily liable to pay the arrears, and consequently his liability is not limited to two years from the original presentment.

The Court has no power to order a sale of the premises on which the grand jury cess is a "charge," under sect. 153 of 6 & 7 Wm. 4, c. 116, for payment of the arrears thereof.

SPECIAL CASE.

This action was commenced on the 29th day of January, 1892, by a writ of summons, whereby the plaintiffs claimed—(1) a declaration that the sum £74 9*s.* 7*d.*, arrears of county cess, remains due and payable in respect of certain premises known as the two mills of Creggaree and Ardnane, in the barony of Ross, in the county of Galway; (2) a declaration that the said arrears are well charged on the said mills and premises; (3) payment of the said sum of £74 9*s.* 7*d.*; (4) if necessary that the said mills and premises may be sold for payment of the said charge, and the parties have concurred in stating the questions of law arising herein in the following case for the opinion of the Court.

1. The plaintiff Thomas King, is the barony cess collector duly appointed for the barony of Ross, in the county of Galway, and the plaintiff Walter Seymour (since deceased), the secretary to the Grand Jury of the said county. By order, dated 8th Nov., 1892,

the proceedings were continued in the name of the said Thomas King, and Walter Gordon Seymour, successor to said Walter Seymour, in the office of secretary to the Grand Jury.

2. The defendant is the owner in fee of certain mills known as the mills of Creggaree and Ardnane, in the barony of Ross, in the county of Galway. In and prior to the year 1874, the said mills were in the occupation of tenants of the said defendant, and all county cess payable in respect thereof, up to and including the cess struck at the Summer Assizes, 1874, has been duly paid.

3. In the year 1874, the said mills ceased to be in the hands of tenants, and same were, and have continued to be, in the possession of the defendant, as owner in fee, but unused and unoccupied from 1874 up to early in 1891, when the defendant converted the said mills into a saw-mills, and commenced to use, and continues to use, the same for his own profit and advantage ; and the said mills have, from early in 1891, been, and still are, in the occupation of the said defendant.

4. The county cess struck at each assizes, since the assizes, 1874, was represented at the following assizes, and each successive assizes, while the said mills remained unused and unoccupied as aforesaid, and at the Summer Assizes, 1888, the sum of £74 9*s.* 7*d.*, being the amount of cess then in arrear, remaining unpaid in respect of the said mills, while they were so unused and unoccupied, was represented in respect of the said mills, and applotted pursuant to the 153rd section of 6 & 7 Wm. 4, c. 116. The defendant does not admit that the Grand Jury had power so to represent, or by such representment to make the sums so represented a continuing charge on the premises.

5. On the defendant becoming the occupier of the said mills, as aforesaid, application was duly made to him for payment of the sum of £79 14*s.* 7*d.*, and £8 6*s.* 3*d.*, being the further cess struck at Summer, 1889; Spring, 1890; and Summer, 1890, and the defendant paid the sum of £13 11*s.* 3*d.*, being the amount of cess due for two years prior to, and including, the cess struck at the Summer Assizes, 1890, but contended that he was not liable to any prior or other arrears, and a receipt on account was given to him.

M. R. 1893.

KING v. ARDILAUN.

The questions for the opinion of the Court are:—

1. Whether the sum of £74 9*s.* 7*d.*, arrears of county cess, accrued prior to Summer Assizes, 1888, remains due and payable in respect of said premises known as the two mills of Creggaree, and Ardnane, in the barony of Ross, and county of Galway.

2. Whether the said arrears are now charged on the said mills and premises.

3. Whether the said sum of £74 9*s.* 7*d.* is due and payable.

4. Whether, if necessary, the said mills and premises may be sold for payment of the said charge.

If the Court shall be of the opinion in the affirmative, then judgment shall be entered for the plaintiffs, with costs.

If the Court shall be of the opinion in the negative then judgment shall be entered for the defendant with costs.

The Attorney-General (*The Right Hon. The Mac Dermot*), and *Butler*, for the plaintiffs.

Roche, Q.C., and *Fetherstonhaugh*, for the defendant.

May 12.

THE MASTER OF THE ROLLS:—

This case comes before me on a special case stated for the opinion of the Court. No point arises as to the parties to sue. It is admitted that the proper plaintiffs are before the Court. There is no question of form, and the facts are sufficiently found to raise the questions which the parties have come here to have decided, viz.:—(1) Whether the owner in fee of mill premises, which are rateable, and rated, for county cess, is liable for arrears of rates struck whilst he was not in occupation, and whilst the premises were in fact unoccupied, he having afterwards gone into occupation, and so continuing at the time when one or more subsequent rates had been struck, and when the arrears were represented; (2) Whether, if so, the arrears are a charge upon the premises, so as to render them liable to be sold to make the arrears good; and (3) Whether any arrears beyond two years from the original presentment thereof are recoverable against the present occupier. A question is suggested in the case as to the power of the Grand Jury to represent for arrears of cess accrued under these

circumstances, but it was not discussed, and Mr. Roche for the defendant admitted that it was competent to the Grand Jury to represent, though he denied his client's liability to pay.

Before considering the questions in detail, I have to say that, in my opinion, the case ought to have been brought in one of the Common Law Divisions. There is no equitable principle involved, and these questions of rating can be more conveniently dealt with by the tribunals which are more conversant with them. However, the case is here, and I shall not decline to decide it.

The case turns upon the construction of a few sections of two statutes, the 6 & 7 Wm. 4, c. 116, and 19 & 20 Vict. c. 63. That Grand Jury cess is (unlike poor-rate) a rate struck upon the hereditaments themselves, and not upon the occupiers, is perfectly well settled, and is clear upon the language of the Acts. The 19 & 20 Vict. c. 63, alters the mode in which the applotment of the rate is made (in cases within the Act), and the machinery for assessing it; but it does not alter the character of the rate itself, which continues to be regulated by the 6 & 7 Wm. 4, c. 116; and by section 151 of that Act it is enacted that it is the duty of the applotters to "applot the sum so to be levied upon such manor, parish, or denomination, fairly and justly, according to the relative annual value of the several sub-divisions of the lands and tenements therein contained, stating as accurately as they can the name of the occupier of each portion of such lands;" and section 153, which is, perhaps, the most important, and which has not been repealed, provides:—"And be it enacted, that the sum or proportion of Grand Jury cess to be raised off each barony or county of a city or town under the treasurer's warrant, duly applotted for any person to pay, shall be a charge upon the lands and premises mentioned in such warrant and applotment, and shall be paid and payable by the person or persons occupying the premises, respectively, at the time such cess is levied thereout, although such person or persons did not occupy the same at the time such cess was imposed, and when the sum payable, by any person or persons, does not exceed fifty pounds, may be sued for by civil bill in the name of the collector, before the assistant-barrister, having jurisdiction to hear and determine causes by civil bill in the county, place, or district, in which the person liable to pay the sum resides." And the

M. R. 1893. KING v. ARDILAUN.

language of the later statute is quite consistent with this view, which has always been entertained and acted upon at any rate since the judgment of Sir Colman O'Loghlen, in the Westport case, decided in 1860, and reported by Mr. Foot, at pages 130, 131, of his book. The learned County Court Judge, says:— "Ever since the introduction of Grand Jury cess it has been, I believe, the practice to assess unoccupied, as well as occupied, premises. I am not aware that the legality of this practice has been the subject of judicial decision, and I have had, therefore, to consider, the case independent of authority on the statutes alone. The conclusion to which I have come is, that unoccupied premises are not exempt from Grand Jury cess. The only ground that has been urged for their exemption is the analogy derived from the decisions under the Poor Law Act, but, in my opinion, that analogy altogether fails. Poor-rate is a rate struck on the 'occupiers of rateable hereditaments,' Grand Jury cess is a rate struck on the 'rateable hereditaments' themselves. The Poor Law Act says that, for defraying the expenses of the Act a rate shall be made on every occupier of premises within the union. The Grand Jury Act (sect. 151) says, that the Grand Jury cess shall be applotted upon every 'manor, parish, or denomination, according to the relative annual value of the several sub-divisions of the lands and tenements, stating, as accurately as possible, the name of the occupier of such land.' Poor-rate is not in strictness a charge on land. The actual occupation of land imposes on the occupier the immediate liability to the payment of the rate, but it is not a 'tax charged,' or imposition on the land which would fall on the tenant within the meaning of the ordinary covenant to pay rent 'over and above all taxes and impositions.' Grand Jury cess, on the contrary, is a charge on the land." He refers to the words of the 153rd section which I have mentioned, and says:— "Poor-rate and Grand Jury cess are, therefore, by no means analogous, and in the absence of authority to the contrary, I am not prepared to upset a practice, which has existed so long, of rating unoccupied premises, and to hold that unoccupied premises are exempt from Grand Jury cess."

There is nothing in the Act to exempt unoccupied premises from rating. On the contrary, the fact that the rate is to be a

charge on the hereditaments, and that it may be levied from an occupier who was not in occupation when the rate is made, is conclusive to show that unoccupied premises may be rated, though the 153rd section prescribes no mode of levying the rate which it declared to be a "charge" upon the lands and premises mentioned in the warrant, other than the processes mentioned in the 151st section, except that it enables sums not exceeding £50 to be recovered by civil bill. It is thus important to consider how this liability, which is a "charge," can be enforced.

I think it plain that it may be enforced, in addition to the methods of distress and summons before a justice of the peace as in sect. 152 pointed out, by action at law. Where a statute enacts that money shall be paid and payable by a specified person, the law imports a legal obligation to pay which can be legally enforced by action in the Law Courts against the person liable; and in this case the remedy by civil bill only applies to small sums. It would be absurd to suppose that arrears amounting to £50 should be recoverable by civil bill, and that no action whatever would lie for arrears amounting to £50 1*s*. But an action *in personam* is not a remedy for enforcing a charge upon lands; and it is remarkable that no means of enforcing that charge, as such, is pointed out in the statutes. If the cess were an annual fixed sum, inasmuch as it is secured by a power of distress, it would, I think, be a rentcharge, and the provisions of the Conveyancing Act would probably apply to it. But it is not an annual sum at all. The amount, and the period of its incidence, are both uncertain, and that Act does not apply. I am not aware of any universal rule, statutory or other, that a charge upon land can in all cases be enforced by a sale of it. If it could be so enforced in the present case, I see no reason why it should not equally be enforced as against the land, even if there were no occupier at all, yet all the provisions of the statute providing a remedy presuppose an occupier who is the person to be affected.

Mr. Roche very forcibly argued that, as the Grand Jury cess is a new liability, depending wholly upon a taxing statute, which statute prescribes the mode or modes for enforcing it, such modes are exclusive. I think this argument is right, and so am unable to hold that I have power to order a sale of the lands. Whether the provisions

M. R. 1893. KING v. ARDILAUN.

of the Judicature Act which enlarge the power of the Court in reference to the appointment of receivers would apply to the proceedings in an action for county cess, I need not decide, as no question is pointed to that view of the case. In the present instance the question is immaterial. The form of the case, too, relieves me from the consideration of many of the decisions upon what constitutes "occupation" within the meaning of the sections. Most of these decisions, such, for instance, as the last, and one of the most important of them, *The Guardians of the Poor of New Ross Union* v. *Byrne* (1), were in reference to the Poor Law Acts, which differ in many essentials from the statutes now before me. They lay down the principle, however, that, in the case of houses and buildings, ownership in fee is not enough *per se* to constitute occupancy, even when no one else is in actual possession; and that such an interest as would suffice to sustain an action of trespass (which is founded upon possession) is not necessarily "occupation" for the purpose of rating. In other words, an unoccupied house has no occupier. This is well put by Mr. Justice Johnson in the *New Ross Case* (1), p. 178:—"A person who is merely legal owner, having as such only legal possession of a rateable tenement, is not rateable as an occupier, but if he has also the immediate use and enjoyment of the tenement, which is capable of being beneficial, he is in actual occupation and rateable as occupier."

In the case before me it is expressly stated that prior to 1891 the defendant was not the occupier of the mills, which were not used by him in any way, or for any purpose, from 1874 till that year. No doubt a mill might be "occupied" in the statutory sense without being used as a mill. It may be occupied as a store for machinery, &c., as the cases show. But no such state of facts is alleged here. Lord Ardilaun was not the occupier till 1891.

But in that year he undoubtedly became the occupier; and so, if the matter turned upon 6 & 7 Wm. 4, would be liable to pay all the arrears represented, save so far as they might be barred by the Statute of Limitations applicable to debts and causes of action created by statute.

The Act of 1856 contains a provision on which the real question

(1) 30 L. R. Ir. 160.

in the case depends, sect. 7; and it is under that section that the defendant has paid the cess for two years prior to 1891. It is as follows:—"With reference to any sums of Grand Jury cess to be presented after the passing of this Act, it shall not be lawful to commence any proceeding for the recovery of any sum in arrear, or unpaid, against any person *not primarily liable* to pay the same after the expiration of two years from the date of the original presentment thereof, anything in this or any former Act to the contrary notwithstanding."

Now, is the defendant within that clause as being a person "not primarily liable" for the antecedent arrears? In my judgment this section was only meant to apply when there are two persons, one of whom is primarily and the other only secondarily liable, that is, liable by reason of the default of the other. It covers the case of a succession of tenancies—one of the tenants having been primarily liable by reason of his occupation of the premises at the time when the rate was in force, and the other being liable, owing to his default, for payment of a rate made in respect of a time when he had nothing to do with the premises whatever. The indulgence of the enactment is intended for the benefit of persons who would otherwise suffer a great and manifest injustice. I do not think that the defendant can be said to be within the words of the section "not primarily liable" to pay the arrears. There is no one else liable at all. He is primarily liable or no one is liable. His lands are charged; and even if, as I have said, there is great difficulty in seeing how the charge could be actively enforced when there was no one in the position of an occupier, yet the words of section 153 cannot be struck out of the Act. Suppose a proceeding by an incumbrancer, under which the house or mill was sold, and the money paid into Court under the provisions of the Landed Estates Act, clearly this charge for rates ought to be put upon the schedule, and paid in its proper priority, before the owner could receive any of the proceeds of sale. It is for the defendant to bring himself within the meaning of the 7th sect.; and even if he was not liable till the rate was enforced, he then became liable, and was, as being the only person liable, primarily liable; or else there is no question of liability at all. In either view he is

M. R. 1893. KING v. ARDILAUN.

outside the section. In other words, I think the defendant must show that he is not primarily liable, and can only do so by showing —(*a*) that he is not liable at all; or (*b*), that someone else is, and that his liability depends upon the default of someone else.

Solicitor for the plaintiffs: *J. Kilkelly.*
Solicitor for the defendant: *H. J. Concannon*

R. W. L.

Appeal. 1893. July 12, 13.

IN THE MATTER OF THE ESTATE OF CHARLES EDWARD DAVISON, OWNER AND PETITIONER (1).

Principal and surety—19 & 20 *Vict. c.* 97 (*Mercantile Law Amendment Act*), *sect.* 5—*Deed—Declaration of trust—Recitals—Estoppel.*

APPEAL, by Henry Jocelyn Davison, from the order of Monroe, J., dated the 20th March, 1893, overruling, with costs, his objection to the final schedule of incumbrances. See the case reported in the Land Judge's Court, 31 L. R. Ir. p. 249.

Price, Q.C., and *F. F. Ledwich* (with them *Ronan, Q.C.*), for the appellant.

Twigg, Q.C., and *J. H. Shaw*, for the respondents (representatives of Henry Newsom).

July 13. THE COURT OF APPEAL affirmed the decision of Monroe, J., and dismissed the appeal, with costs.

Solicitors for the appellant: *D. & T. Fitzgerald.*
Solicitors for the respondents: *Whitney & Co.*

G. Y. D.

(1) Before WALKER, C., and FITZ GIBBON and BARRY, L.JJ.

IN THE GOODS OF MARY TALLON, DECEASED.

(IN THE MATTER OF AN INTENDED ACTION OF WALSH *v.* TALLON.)

Probate.
1893.
May 15.

Practice—Heir-at-law made a party—R. S. C. Ir., 1891, *Order XVI., Rule* 10.

Where an executor is proceeding to prove a will affecting real estate in solemn form, the Court has power, under Order XVI., Rule 10, to authorize the executor to make the heir-at-law a defendant in the intended action.

MOTION on bahalf of the executors before writ issued for leave to make the heir-at-law a party defendant in an intended action to prove the will of deceased in solemn form.

Sheil, in support of the motion :—

The executors of deceased are proceeding to prove her will in solemn form. A draft writ, in which the executors are plaintiffs and the next-of-kin and heir-at-law are named as defendants, has been prepared and lodged with the officer of this Court, together with an affidavit verifying the indorsement on the writ. The affidavit also shows that deceased died possessed of real estate, which is dealt with by her will; that the will is since the Wills Act, and it shows who is her heir-at-law. The writ is not yet issued.

The leave of the Court is now asked to make the heir-at-law a party defendant to the action, and to so name him in the writ as in the draft already lodged with the officer. Order XVI., Rule 10, of the R. S. C., 1891, is relied upon. This rule introduces a new practice in this country; the heir may now in a proper case be either cited or made a party to the action. Under the former practice, and also under the rules at present in force in England (R. 78, C. B.), there is no power to make the heir a party; he can only be cited to see proceedings, and the practice is to issue such a citation after plaintiffs and defendants have pleaded in the action.

Probate. 1893. *In re* TALLON.

See *Moore* v. *Holgate* (1). In *Kennaway* v. *Kennaway* (2), Sir J. Hannen expressly distinguishes between "citing" and "making a party." The new Irish Rule appears designed to enable the heir to be made a party from the commencement of the proceedings, and such a course is convenient, as it avoids any necessity of amendments in the pleadings or re-serving the original parties with the writ or pleadings.

It is in no way contrary to section 65 of the Irish Probate Act, which enacts that the heir may be cited or otherwise summoned in like manner as the next-of-kin.

The Court granted the application; plaintiffs to have their costs in the action.

Solicitor for the plaintiffs: *John O'Hagan.*

W. L.

Monroe, J. 1893. April 24.

IN THE MATTER OF THE LOCAL REGISTRATION OF TITLE (IRELAND) ACT, 1891, AND THE APPLICATION OF THE RIGHT REV. JOHN KEYS O'DOHERTY, ROMAN CATHOLIC BISHOP OF DERRY, AND JAMES M'REYNOLDS, OWNERS OF LAND.

Premises impressed with trust for parochial purposes—Trustees appointed by the Court—Local Registration of Title (Ireland) Act, 1891—Right to register as owner.

Premises which had been occupied by successive parish priests were purchased under the Purchase of Land (Ireland) Act, 1885, by the then parish priest. After his death the premises were declared, by a judgment of the Master of the Rolls, to be impressed with a trust for parochial purposes, and trustees, one of whom was the Roman Catholic bishop of the diocese, were, by order of the Court, appointed, in whom the premises were vested:—

Held, that the trustees (though not trustees for sale) should, under the special circumstances of the case, be registered as owners, under the Local Registration of Title (Ireland) Act, 1891.

(1) L. R. 1 P. & M. 101. (2) 1 P. D. 148.

Monroe, J.
1893.
In re O'DOHERTY.

EX PARTE APPLICATION on behalf of the Rt. Rev. John Keys O'Doherty, Roman Catholic Bishop of Derry, and James M'Reynolds, for an order declaring them entitled to be registered as owners of part of the lands of Dungiven, in the Barony of Keenaght and County of Londonderry, containing 14A. 2R. 20P. statute measure, or thereabouts, formerly held by the successive priests of the parish of Dungiven, under the Skinners' Company.

The application was grounded on the affidavit of the Rt. Rev. John Keys O'Doherty, Roman Catholic Bishop of Derry, which stated that part of the lands of Dungiven, in the diocese of Derry, containing 14A. 2R. 20P. statute measure, were formerly held by each succeeding priest of the parish of Dungiven, as tenants from year to year under the Skinners' Company, and that on the 23rd April, 1888, the Rev. Michael Tracey, then parish priest, purchased the holding in his own name under the Purchase of Land (Ireland) Act, 1885. By a judgment of the Master of the Rolls, pronounced on the 2nd July, 1891, in a suit instituted after the death of the Rev. Michael Tracey by the Attorney-General, the parish priest and two parishioners of the parish of Dungiven against the executor and trustees of the will of the Rev. Michael Tracey, it was declared that the said farm of land and dwelling-house thereon were impressed with a trust for and were parochial property attached to the Roman Catholic parish church of the parish of Dungiven, and it was adjourned to Chambers to appoint trustees of the deed of the 23rd April, 1888; and it was declared that upon such appointment the farm and house should be vested in such new trustees upon the said trusts. The Right Rev. John Keys O'Doherty and James M'Reynolds were accordingly appointed by the Court trustees of said deed, and they thereupon took the proper steps under the Local Registration of Title (Ireland) Act, 1891, to have their names entered in the Register as owners of the said lands, but the Registrar objected that, as they were neither trustees for sale nor beneficially entitled to the premises, they were not entitled to be registered.

Wylie, in support of the application, referred to the Settled Land Act, 1882, sect. 63; Settled Land Act, 1884, sect. 7; Local

Monroe, J. 1893. *In re* O'Doherty.

Registration of Title (Ireland) Act, 1891, sects. 22, 23 (sub-sect. 2), 25, 26, 28, 30 (sub-sects. 4, 5), 39, 63, 71.

Monroe, J., granted the application.

Solicitor for the applicants: *J. Loughrey.*

W. G.

Monroe, J. 1893. June 21. July 4.

IN THE MATTER OF THE ESTATE OF MICHAEL SMITH, OWNER; JOHN THOS. HINDS AND JOHN O'REILLY, PETITIONERS.

Solicitor and client—Costs—One of several trustees acting as solicitor in relation to trust estate.

A mortgage was vested in two trustees of a settlement, upon the trusts thereof. One of the trustees, who was a solicitor, acted professionally in the matter of a petition on behalf of his co-trustee and himself for sale of the mortgaged premises:—

Held, that the rule in *Cradock* v. *Piper* (1 Mac N. & G. 664) applied, and that the trustee solicitor's costs of the proceedings were entitled to rank on the final schedule of incumbrances in priority to the mortgage.

Motion by the surviving petitioner, John O'Reilly, to set aside the objection to the final schedule of incumbrances filed by Miss Adelaide Potterton, administratrix of the deceased petitioner, John Thomas Hinds, solicitor.

The objection stated that Mr. Hinds had been solicitor for the petitioners (O'Reilly and himself) from the presenting of the petition for sale till his death, which occurred on the 2nd December, 1887, and claimed the costs due to the estate of the said John Thomas Hinds, as solicitor for the petitioners, and that the same should be inserted in the schedule next after the duties to the Crown, and prior to the claim of the first mortgagee.

The first mortgage appearing in the schedule was vested in the surviving petitioner, John O'Reilly. It was a security for £1000, dated the 29th November, 1880, granted by the owner to John Thomas Hinds and John O'Reilly, who were trustees of a settle-

ment dated the 25th July, 1871, made on the marriage of Francis John O'Reilly and Rebecca Hoey, the £1000 being the wife's fortune, and vested in the trustees on the trusts of the settlement.

John O'Reilly now contended that as John Thomas Hinds was trustee of the mortgage he was not entitled to charge as against his *cestui que trusts* any costs of the present proceedings, or, at all events, that he was not entitled as against them to any profit costs. The settlement of the 25th July, 1871, was lost, and the contents of it were proved by the affidavit of Francis John O'Reilly. It was not alleged by Miss Potterton that the settlement contained any clause enabling John Thomas Hinds to charge for professional services.

A. Todd, in support of the motion, cited *Manson* v. *Baillie* (1); *Home* v. *Pringle* (2); *Broughton* v. *Broughton* (3); *Lincoln* v. *Windsor* (4); *In re Corsellis* (5).

Meredith, *Q. C.*, for Miss Potterton, relied on *Cradock* v. *Piper* (6); *In re Barber* (7), and read the passages from Lord Justice Cotton's judgment in *In re Corsellis* (5), p. 682, where he stated that the rule in *Cradock* v. *Piper* (6) was too long established to be disturbed or reversed: Seton on Decrees, 5th ed. vol. i., p. 263.

MONROE, J.:—

July 4.

The petition for sale in this case was filed by John Thomas Hinds and John O'Reilly, for the purpose of realizing the sum of £1000, money lent by the petitioners to the owner, on the security of a mortgage of the lands for sale. John Thomas Hinds, who was a solicitor, acted for the petitioners down to the date of his death in 1887. The property has realized only the sum of £700, and the surviving trustee, as well as the persons beneficially entitled to the incumbrance, deny the right of John Thomas Hinds to

(1) 2 Macq. H. L. 80.
(2) 8 Cl. & Fin. 264; judgment of Lord Cottenham, pp. 286, 287.
(3) 5 De G. M. & G. 160.
(4) 9 Hare, 158.
(5) 34 Ch. D. 675; judgment of Cotton, L.J., p. 684.
(6) 1 Mac N. & G. 664.
(7) 34 Ch. D. 77.

Monroe, J. 1893. *In re* SMITH'S ESTATE.

recover the costs of the proceedings, inasmuch as he was solicitor and trustee while the proceedings were being carried on, or they contend, in the alternative, that he should not be allowed any profit costs.

The ordinary rule of equity on this matter is perfectly clear and distinct. A solicitor who is a trustee is not allowed to charge for his services in carrying out the trust, the obligation of which he has accepted. He may, if it be necessary to have a solicitor's services, retain another. If he carry out the work himself, he must do it gratuitously, else his interest and his duty would be in conflict. To this general rule one exception was made in the case of *Cradock* v. *Piper* (1), which came before Lord Cottenham as Lord Chancellor. The exception amounts to this, that where a solicitor trustee carries on business in Court connected with the trust estate, and acts not merely for himself as a party to the proceedings, but also for some other party or parties, whether it be for a co-trustee, a *cestui que trust* or any other person interested, he will be allowed his full costs, provided these are not increased in any way by the fact of the solicitor acting also for himself.

This limitation of the general principle has been often questioned, but it has never been overruled. It was spoken of with disapproval by Lord Brougham in *Manson* v. *Baillie* (2); and by Lord Cranworth in *Broughton* v. *Broughton* (3); but it has been recognized as still a valid and existing authority by Mr. Justice Chitty: *In re Barber* (4); and by the Court of Appeal: *In re Corsellis* (5). Mr. Todd sought to narrow the exception made in *Cradock* v. *Piper* (1) to the cases in which a trustee solicitor and his co-trustee were made co-defendants in a suit, and where the solicitor represented both, and he contended that it did not include those cases where a trustee solicitor instituted proceedings on behalf of himself and his co-trustee as plaintiff. For this he relied on some observations of Lord Justice Turner in *Lincoln* v. *Windsor* (6), and of Lord Cranworth in *Broughton* v. *Broughton* (3). There is, however, no decision to this effect, and the distinction is not taken by the Court of Appeal in *Re Corsellis* (5). Indeed I find that

(1) 1 Mac N. & G. 664.
(2) 2 Macq. H. L. Cas. 80.
(3) 5 De G. M. & G. 160.
(4) 34 Ch. Div. 77.
(5) *Ibid.* 675.
(6) 9 Hare, 158.

part of the costs given to the solicitor in *Cradock* v. *Piper* (1) were the profit costs, which he claimed as solicitor for himself and his co-trustee in instituting proceedings for the administration of the trust estate.

In my opinion, therefore, Mr. Hinds is entitled to have his costs of these proceedings taxed in the ordinary way, and paid in priority to the claim of those beneficially entitled to the purchase-money, under the deed of mortgage. It was sought to show that the representatives of Mr. Hinds should be debarred from all claim as to costs, as he had made an improper investment of the trust funds in a security which has proved deficient. No proof of this was laid before me, and a claim of a similar character made in a suit for the administration of Mr. Hinds' assets has been already rejected by the Court of Chancery.

Solicitor for Miss Potterton, the objector: *John Clark.*

Solicitor for John O'Reilly, the surviving petitioner: *Hoey & Denning.*

W. G.

TAAFFE *v.* FITZSIMONS.

(1886. No. 8735.)

Attachment—Non-lodgement of certified balance—Fiduciary relation.

In an action to administer the personal estate of P. T., deceased, the judgment on further consideration ordered the defendants, who were administrators with the will annexed of the widow of the deceased, to lodge in Court £310, the balance certified to be due by her to the estate. The defendants having failed to comply with the order, the plaintiff moved that they might be arrested and committed to prison for their contempt:—

Held, that no fiduciary relation between the parties had been established, and therefore that an order for attachment could not be granted.

MOTION to attach the defendants Rev. Michael Fitzsimons and Kate Gibney, administrators, with the will annexed of Bridget

(1) Mac N. & G. 664.

V.-C. 1893.

TAAFFE v. FITZSIMONS.

Taaffe for contempt of Court in not lodging the sum of £310, by judgment on further consideration, dated 9th March, 1893, ordered to be brought into Court by the defendants. The said sum of £310 was by the chief clerk's certificate found to be the value of the deceased's stock, implements of husbandry, and household furniture which, being on his farms at his death, were received by his widow Bridget Taaffe, and which, or others of a like nature, and of the same value, remained in her possession till the time of her decease, and which amount was certified to be due by her.

Miles Kehoe, for the plaintiff :—

The defendants have disobeyed the order of the Court, and are liable to attachment for contempt. No offer has been made to bring this money into Court. The only Court open to the plaintiff is to move for an attachment. The defendants are persons having a fiduciary capacity : *Marris* v. *Ingram* (1).

Roche, Q.C., for the defendants :—

This application is not tenable. No fiduciary relation has been established between the defendants and the plaintiff : *Holyroyde* v. *Garnett* (2). The motion is not founded upon breach of trust, but on breach of duty. On the merits the application is harsh and stringent. The defendants have offered to lodge £100 within a week.

THE VICE-CHANCELLOR :—

I cannot assent to the inference drawn by Mr. Roche from the case of *Holyroyde* v. *Garnett* (2), that there is any necessity, in order to entitle the plaintiff to succeed, to show moral fraud on the part of the defendants. It is the settled practice of the Court, on which I have always acted, that where a fiduciary relation is established between the parties, and money is found to be due in respect of that relation, and ordered to be brought into Court, an attachment will be granted where such an order has been disobeyed. The question here is whether there was a fiduciary

(1) 13 Ch. Div. 338. (2) 20 Ch. Div. 532.

relation between the parties. It appears to me that no such relation has been established. The facts are simple. The testator, whose estate was administered in this action, bequeathed certain farms with the chattels upon them to his widow for her life, or during her widowhood. On her death these goods were taken possession of by the defendants. The fact that they are the personal representatives of the widow does not establish any fiduciary relation between them and the persons whose goods they took. The facts do not justify an application for attachment. I must refuse the motion, with £5 costs.

Solicitor for the plaintiff: *Thomas R. Lynch.*
Solicitor for the defendants: *John Thomas Hinds.*

T. H. M.

GRAY, DECEASED.
(GRAY *v.* GRAY.)
(1893. No. 619.)

Land Law (Ireland) Acts, 1881 (*sect.* 8, *sub-sect.* 6), *and* 1887 (*sect.* 1)—*Lease for lives in being—Agreement under Act of* 1881, *fixing fair rent—Devolution of tenant's interest.*

W. G. held a farm of land as lessee under a lease, dated 1st May, 1824, by which the lands were demised to P. F., to hold unto P. F., his heirs, executors, administrators, and permitted assigns, for the lives therein named. One of the *cestui qui vie* survived W. G. On the 13th February, 1890, an agreement and declaration fixing a fair rent, pursuant to sect. 8, sub-sect. 6, of the Land Law (Ireland) Act, 1881, was entered into between the landlord and W. G., and duly filed in the Court of the Irish Land Commission. W. G., on the 26th November, 1890, mortgaged the said farm, and died on the 15th September, 1891. The farm was sold after his death, under the power of sale in the mortgage, and there remained, after payment of principal and interest due on foot of the mortgage, and arrears of rent, a sum of £500:—

Held, that the agreement under the Act of 1881 could only have been entered into on the basis of a surrender of the lease, and the creation of a tenancy from year to year, at the rent agreed upon, and that the sum of £500, which represented the tenant's interest in the farm, descended as personal estate.

V.-C. 1893.

In re Gray.

Originating Summons under Ord. LV., R. 4, to determine, without administration of the estate of William Gray, deceased, whether certain lands of which the deceased died possessed formed portion of his real or personal estate.

The deceased died on 15th September, 1891, leaving him surviving his widow the plaintiff, the defendant John E. Gray, his eldest son, and heir-at-law, and the defendant Mary Kathleen Gray, his sole next-of-kin. From an affidavit of the plaintiff, who was administratrix of the deceased, it appeared that William Gray held under Lady Wallace a farm of land situate in the townland of Lurganure, parish of Lisburn, and county of Antrim, under a lease dated 1st May, 1824, made between the Marquis of Hertford and Philip Fletcher, to hold unto him, his heirs, executors, administrators, and permitted assigns, for three lives therein named, one of whom was living at the death of William Gray, at the yearly rent of £55 15*s.* 2*d.* On the 25th October, 1887, the said William Gray, with the concurrence of the landlord, served an originating notice pursuant to section 1 of the Land Law (Ir.) Act, 1887, claiming to be deemed and declared tenant of a present tenancy. This notice was not served on the Land Commission, and no order was made thereon.

On the 13th February, 1890, an agreement and declaration fixing a fair rent pursuant to the provisions of section 8, sub-section 6 of the Land Law (Ir.) Act, 1881, was entered into between the then landlord Sir Richard Wallace, and the said William Gray, and the judicial rent of the farm was thereby fixed at the yearly sum of £57 10*s.*; and the said agreement was duly filed in the Court of the Irish Land Commission. By indenture of mortgage, dated 26th November, 1890, William Gray mortgaged the said farm to the Lisburn Loan and Discount Company, to hold unto the Company, their successors, and assigns, for all the residue to come of the statutory term of fifteen years, from 25th February, 1890, and for all terms of years, tenant-right, and interest in the premises, by virtue of the Land Law (Ir.) Acts, 1881 and 1887, to secure repayment of the sum of £500 and interest; and the Company covenanted, on payment of the said sums, to re-convey the lands to William Gray, his executors, administrators, or assigns. The Company transferred the mortgage

to W. H. Rowan, who, as mortgagee, on the 27th December, 1892, sold the lands, and after payment of the amount due for principal and interest and arrears of rent, with the consent of the administratrix, retained in his hands a balance of £500, pending the directions of the Court.

Meredith, Q.C., for the plaintiff :—

The agreement fixing a fair rent under the Act of 1881 could only have been entered into on the basis of a surrender of the lease for lives under which the deceased held. Had the proceedings under the first section of the Act of 1887 been completed, there could be no question that the lease would have been determined: *Smyth* v. *Moore* (1); *Sturges* v. *Ryan* (2). The tenant can surrender a lease; *Cooke* v. *Torrens* (3). It would amount to a fraud on the landlord for the tenant to say that the lease is still subsisting. Besides in the mortgage the covenant is to re-convey to the tenants, executors, administrators, or assigns, and the land being held *pur autre vie* this would make it descend as personal estate: *Jenison* v. *Lexington* (4).

Henry Maxwell, for the defendant Mary Kathleen Gray :—

The agreement entered into under the Act of 1881 is, by section 8, sub-section 6 of that Act, to "have the same effect and consequences in all respects" as if the rent had been judicially fixed by the Court, when the tenant would be tenant of a present tenancy from year to year. Section 3 of the same Act provides that in the event of a tenant of a tenancy to which the Act applies dying intestate his personal representative is to nominate some one of the persons entitled under the statutes of distribution to his personal estate, &c. Section 9 of the Land Act, 1860 (23 & 24 Vict. c. 154) does not apply; for in the present case if the lease still subsists there is a special occupant. I submit that the money representing the tenant's interest forms portion of his personal estate.

Blood, for the defendant John E. Gray :—

The nature of the property has not been changed by the filing

(1) 32 L. R. Ir. 129.
(2) 24 L. R. Ir. 305.
(3) 22 L. R. Ir. 239.
(4) 1 P. W. 555.

V.-C. 1893.

In re GRAY.

of an agreement which only regulates the amount of rent payable under the lease. Here there is a special occupant, and the lessee's interest does not devolve upon his personal representative, as would otherwise happen under section 9 of Land Act, 1860. The lease has not been extinguished, and the limitations in it are not in any way affected: *McDermott* v. *Balfe* (1).

THE VICE-CHANCELLOR:—

In this case the deceased lessee served a notice under the Land Law (Ireland) Act, 1887, to have a fair rent fixed, but this notice was not served on the Land Commission, and not having been proceeded with, must be treated as having lapsed. Without an order having been made upon it the notice would not have the effect of putting an end to the tenancy under the lease.

A statutory agreement under the Act of 1881 was subsequently entered into between the landlord and tenant and duly filed. That could only be done by a tenant from year to year, and on the basis of a surrender of the previously existing lease. The agreement filed was inconsistent with the existence of the lease, and, in my opinion, both parties are estopped from denying this. *Ex necessitate* there arose a new tenancy from year to year, as between landlord and tenant, and the tenant's interest must have the same character as between the heir-at-law and the personal representative.

The costs must be provided for out of the personal estate.

Solicitor for the plaintiff: *Joseph Lockhart.*
Solicitor for the defendants: *H. F. Leachman.*

T. H. M.

(1) Ir. R. 2 Eq. 440.

BRENNAN *v.* BRENNAN.

(1893. No. 840.)

V.-C.
1893.
Nov. 23, 28.

Will—Construction—Gift of interest for maintenance—Severance from general personal estate—Vesting.

M. B., by his will, directed his executors to invest £1000, and with the interest to pay an annuity of £30 to his wife for life, or until she should marry again, and directed the £1000 to be distributed, share and share alike, among all his children, to each respectively—if a boy, on his attaining twenty-four; and if a daughter, upon marriage with consent. The testator directed that a sum of £500 should be invested for the benefit of his younger children in equal shares, to be paid to each, if a boy, at the age of twenty-four, and if a girl, on marriage with consent. And the testator bequeathed the residue of his property, after certain other bequests, in equal shares, to all his children upon their attaining the age of twenty-four years respectively, and directed his executors to invest, for the maintenance of his children during their minorities, or if girls until their marriage, all the moneys to which they might respectively be entitled under his will:—

Held, that the shares of the children in the £1000, in the £500, and in the residue, vested on the death of the testator.

Where there is one gift of *corpus* and income as parts of a whole, a gift otherwise contingent will be vested; but where there are separate gifts, one of capital and one of income, not necessarily going together, the gift will not be deemed vested.

Fox v. *Fox* (L. R. 19 Eq. 286) considered.

SUMMONS to take the opinion of the Judge upon the true construction of certain bequests contained in the will of Michael Brennan, who died on 13th February, 1879. By his will, dated 9th February, 1876, the testator, after directing payment of his debts and funeral expenses, devised and bequeathed all his property to trustees, and bequeathed to his wife for her life an annuity of £30, for the purpose of bringing up his younger children and for their and her joint benefit, and bequeathed to her the use and occupation of certain farms. The testator provided that if his wife should marry again she should forfeit these bequests. The testator directed his executors to invest a sum of

V.-C. 1893.

BRENNAN v. BRENNAN.

£1000, with the interest of which they should pay the annuity to his wife, and he directed "the said principal sum of £1000 to be distributed share and share alike amongst all my children to each, respectively, if a boy, on his attaining the age of twenty-four years; and to my daughters upon their marriage, provided they marry with the consent of their mother, and in case of her death with the consent" of one of the executors. The testator directed that a sum of £500 should be invested as his executors should think fit "for the benefit of his younger children, in equal shares, to be paid to each," on attaining twenty-four years if a boy; or, if a girl, on marriage with consent, as in the previous bequest. After certain bequests the testator bequeathed the residue of his property in equal shares to all his children upon their attaining the age of twenty-four years respectively; and the testator directed his executors to invest for the maintenance and education of his children during their minorities, or, if girls, until their marriage, all the moneys to which they might respectively be entitled under his will.

The summons was taken out by direction of the Lord Chancellor, on the part of John P. Brennan, a son of the testator, who had been discharged from wardship. In pursuance of an order made in the minor matter the chief clerk certified that there was in Court, to the credit of the matter, £1083 19*s.* 4*d.*, part of the assets of Michael Brennan. This represented £1000 directed to be invested by Michael Brennan's will. The testator left him surviving his widow, who had since died, and five children, John, Michael, Thomas, Hubert, and Mary. Thomas and Mary died under age. Administration to Thomas was taken out by Hugh Bleaham and to Mary by the present plaintiff.

Day, for the plaintiff:—

The shares of £1000 vested on the death of the testator. There is a separation of this sum from the rest of the testator's assets. The last clause in the will providing for maintenance and education implies that the testator intended these shares to vest. In *Lister* v. *Bradley* (1) a gift to a son "when, or if he attains twenty-one," was held vested.

(1) 1 Hare, 10.

A severance from the testator's general estate would be sufficient to vest the gift: *Saunders* v. *Vautier* (1). In *Fox* v. *Fox* (2), a gift to a class followed by a gift of maintenance in the meantime was held vested. *Ashmore's Trusts* (3), which appears in conflict with *Fox* v. *Fox* (2) does not apply. Counsel also cited *Barker* v. *Barker* (4); *Wilson* v. *Knox* (5); *Hart's Trusts* (6).

Ignatius O'Brien, for the defendants:—

The surviving minors take the £1000, and also the £500, and the residue between them: *Lister* v. *Bradley* (7), and *Saunders* v. *Vautier* (1) were both cases of specific legacies. Here the legatees only take distributive shares. A gift for maintenance is not equivalent to a gift of interest for the purpose of vesting a legacy. In the present will there is no gift of interest: *Pulsford* v. *Hunter* (8). *Fox* v. *Fox* (2) does not govern this case, and is not good law. In *Wilson* v. *Knox* (5) the Master of the Rolls held that that decision did not apply except where there was a gift of income. As to the £1000, the entire sum is not directed to be applied to maintenance for the £30 annuity was to be paid out of the interest.

THE VICE-CHANCELLOR:— Nov. 28.

The summons, as amended, contains three questions:—1st, as to the sum of £1000, which the testator directed to be invested in order to provide an annuity of £30 a-year for his wife, for her life, or till her marrying again; 2nd, as to the sum of £500, which he directs to be raised and re-invested for the benefit of his younger children; and 3rd, as to the residue of his personal estate.

The £1000 he directs to be invested, and the interest of it to be applied to pay the £30 a-year to his wife so long as she should be entitled to the same under the terms of his will, that is, while she remained unmarried; and he then directs that the principal should be distributed, share and share alike, amongst all his children, to each respectively, if a boy, at twenty-four, and to his daughters

(1) Craig & Ph. 240.
(2) L. R. 19 Eq. 286.
(3) L. R. 9 Eq. 99.
(4) 16 Ch. Div. 44.
(5) 13 L. R. Ir. 349.
(6) 3 De J. & J. 195.
(7) 1 Hare, 10.
(8) 3 Br. C. C. 416.

V.-C. 1893. BRENNAN v. BRENNAN.

upon their marriage with consent. In a later clause he directed that his executors should invest, for the maintenance and education of his children during their minorities, or if girls until their marriage, all the moneys to which they might *respectively* be entitled under his will. The question is, whether this sum of £1000 vested in the children. The gift to them is not as a class, but of an equal and divided share to each, and the words, "to be distributed," are equivalent to "to be paid." The gift, therefore, must be dealt with as if an aliquot part was directed to be paid to each such child on attaining the age of twenty-four, or in case of a daughter on her marriage. It is not material that there are two future and contingent events referred to, one being the cesser of the wife's annuity, and the other the attaining the prescribed age or event. The former may, I think, be laid aside. A general legacy, given in the words here used, cannot, without more, be taken as a clear gift with a deferred period for payment. I shall therefore assume that the gift here would not be vested, but contingent only on attaining the prescribed age or event, if there were no more in the case. But, first, it is important to observe that the subject of the gift, namely, the £1000, is directed to be invested by the executors for the special purpose, subject to the annuity, of providing a fund for the payments to the children. For this purpose it must be severed from the general personal estate, and held in trust for the children. Such severance was to be made immediately on the death of the testator, and the severed fund was thenceforth to be held by the executors as trustees for the several persons designated. The case comes clearly within the rule mentioned and acted on by Lord Cottenham in *Saunders* v. *Vautier* (1). On this ground alone I should hold that the gifts to the children were vested on the death of the testator.

Another important circumstance relied on for the children is the clause directing the executors to invest, for the maintenance and education of the children during their minorities, or till marriage of daughters, all the moneys to which they may *respectively* be entitled under the will. The clause is inaccurately worded, but I find nothing to restrict its generality. It applies

(1) Craig & Ph. 240.

to the £1000, as well as to all other moneys. The purpose for which the investment was directed was the maintenance and education of the children during their minorities, or till marriage of daughters. There is no discretion given to the executors on this subject, and it would be their duty to apply the entire income, so far as necessary, for their maintenance and education. The words, "may be respectively entitled," show that there was no intention to throw the whole income into one common fund for the maintenance and education of all, but to apply the income of the bequest to each for the benefit of the owner. The case is free from the doubts raised as to the case of *Fox* v. *Fox* (1). It is not a gift for maintenance out of the income, but a gift of the interest, to be produced by the investments which it was directed that the executors should make. The only object of the investment was to produce interest on the invested fund, and the whole of this income was, in my opinion, applicable to maintenance. It seems, therefore, to me to be a gift of interest for maintenance, and not for maintenance out of interest. Perhaps the true principle of the cases is that when there is one gift of *corpus* and income, as parts of a whole, a gift otherwise contingent, will be vested, but that where there are separate gifts, one of capital and one of income, not necessarily going together, the gift will not be deemed vested.

On both the grounds I have stated I shall answer this question in the affirmative.

The next question is as to the £500, which the testator stated he was empowered to raise under his father's will. The same reasons apply to this, for it was to be invested at once on being raised, and held in trust as a separate fund for the testator's younger children, and it was also included in the maintenance clause, on which I have observed. In addition to these reasons, I think that there is a complete gift to those children, apart from the direction for payment on attaining twenty-four, or marriage. The words, "shall be invested for the benefit of my younger children," are equivalent to an immediate gift to each, this being followed by a direction for payment to each on attaining twenty-four, or marriage as to daughters.

(1) L. R. 19 Eq. 286.

V.-C. 1893. BRENNAN v. BRENNAN.

The remaining question is as to the vesting of the residue. There is here, of course, no severance of the subject of the gift, and the argument for vesting must be confined to the maintenance clause. But as I have held that that clause would suffice in the other cases, and as it applies equally to this case, I must hold this bequest also to have vested on the death of the testator.

The costs must come out of the personal estate.

Solicitors for the plaintiff: *Ryan & Nolan.*
Solicitor for the defendants: *Mathew J. Brady.*

T. H. M.

V.-C. 1893. Nov. 15, 16, 17. Dec. 13.

MOORE *v.* M'GLYNN.

(1892. No. 284.)

Will—Power to trustees to arrange for the settlement of children—In case of disagreement power to umpire to determine amounts—Extent of power of trustees—Control of Court—Testator postmaster—Trustee procuring his own appointment—Personal office under Crown—Wilful default—Trustee setting up rival business.

A shopkeeper, who was also a local postmaster, by his will bequeathed all his property to his brother and son, to be held by them in trust, and to be managed by them for the benefit of his wife and children, and directed that the brother should have the right of maintenance and a salary for the management of the business, that the trustees should have power to arrange for the settlement of his children as they might determine, and that, in case they disagreed, the parish priest should have full and absolute power to determine both as to amount payable and times of payment. The testator left a widow and nine children. The trading was continued by the testator's brother, and some years after the testator's death the trustees made a valuation of the property available for distribution, and dividing the sum at which they valued it into ten equal shares, they decided that the sum representing one such share was the amount payable to one of the children. This she declined to accept.

In an action brought by her for administration of the estate, and accounts on the basis of wilful default and breach of trust:—

Held, that the powers given to the parish priest might be resorted to to explain the meaning of the power given to the trustees, and that they must be taken to have powers to determine the amounts and times of payment; but,

held, that although the rule applicable to such cases of discretionary power is that the exercise of such power will not be interfered with or controlled, if it be regularly and honestly used, and although the division into equal shares was free from objection, the ascertainment by the trustees of the total amount to be distributed, which depended on the due discharge of their own duties, was subject to the investigation and control of the Court; that it was not necessary for the plaintiff to prove any breach of duty by the trustees for the purpose of having accounts taken of the trust property, the right to this resulting from the mere relation between them, and that, irrespective of the charges made against the trustees, there should be the usual administration accounts.

Soon after the testator's death his brother applied to be himself appointed postmaster. In his application he stated that the testator had bequeathed all his property in trust to him and the testator's son, for the benefit of the testator's wife and children, and that, if the applicant were appointed the business would be carried on in the same premises. The brother was appointed postmaster, and he retained the post office on the testator's premises, and managed same in conjunction with the testator's other business for some years, when he set up in business for himself in the same town, and transferred the post office to his new premises:—

Held, that the brother was absolutely entitled, for his own benefit, to the emoluments of the office of postmaster; that there could not be anything like a graft upon the former term of it for the benefit of the testator's assets, or any liability on the part of the officer to account for its profits; that he had a right to transfer the post office to his own premises, and that the utmost of his liability would be payment of compensation for the use and occupation of the office in the premises of the testator.

The liability under a mere direction to account on the basis of wilful default does not apply to possible loss of profits in trading occasioned by the setting up by a trustee of a rival business.

A plaintiff seeking relief against wilful default must allege in his pleading some specific act of wilful default, or, at least, make a strong case for inquiry.

A trustee of a will carrying on the business of his testator is not guilty of a breach of trust in setting up for himself in a similar line of business in the neighbourhood, provided that he does not resort to deception, or solicitation of custom from persons dealing at the old shop. A trustee and manager of a business removed, however, under such circumstances from being such trustee and manager.

ACTION for the administration of the real and personal estate of William M'Glynn, deceased, and for other relief, including an injunction.

The statement of claim alleged:—William M'Glynn of Clara, in the King's County, made his will, dated the 24th November, 1887, and thereby bequeathed all his property to his brother

V.-C. 1893. MOORE v. M'GLYNN.

Edward M'Glynn and his son Patrick Joseph M'Glynn (the defendants) in trust to be managed for the benefit of his wife and children; and he directed that his said brother should have a right of maintenance and lodging in his house, and that he should receive an annual salary of £60 and interest at £5 per cent. on moneys of his own invested in the business carried on by the testator, and he appointed the defendants executors and trustees of his will. The testator died on the 28th November, 1887, leaving his widow, Ellen, and nine children, including the said Patrick Joseph and the plaintiff Hannah, who married Thomas Moore in February, 1891. Four of the children are still under age. The deceased left considerable property, the exact particulars of which are unknown to the plaintiff, as the defendant Edward M'Glynn refused to give her any information. The greater part of the personal estate of the deceased was invested in a grocery and hardware business, carried on by him at Bridge-street, Clara; he had a valuable stock-in-trade, and the good-will of the business was worth a good deal; he had an interest in the premises in Bridge-street, and in some farms, of which the plaintiff is unable to state the tenure; he was also local postmaster, and had his office in the Bridge-street premises. The will was proved by both defendants, but Patrick Joseph M'Glynn never took an active part in the management of the property, which management was entirely assumed by Edward M'Glynn, who since the death of the testator carried on the business, and, relying on his position as trustee, had himself appointed local postmaster. About twelve months before action Edward M'Glynn opened in Clara a rival hardware and grocery business; in this business he invested a considerable portion of the property of the testator, and transferred the post office to the premises in which he carries on the rival business, and caused considerable injury to the trust business, from which the plaintiff charges he still draws his salary. The said defendant never furnished any account of his management of the trust property, and refused to do so; the plaintiff received a sum of £10 only out of the assets. The said defendant, by his wilful default and breaches of trust, reduced the value of the property of the deceased; Patrick Joseph M'Glynn never interfered to prevent the action of his co-trustee.

The plaintiff claimed:—(1) An account of the real and personal estate of the deceased, which the defendants had, or without wilful default might have received. (2) An account of the profits of the business of the deceased carried on in the Bridge-street premises. (3) An inquiry what portion of the trust property had been invested by Edward M'Glynn in his own business, and a declaration that same was bound by the trusts of the will. (4) Removal of the defendants from the position of trustees, and the appointment of new trustees, and the removal of Edward M'Glynn from the management of the business, and the appointment of a receiver and manager. (5) Administration of the real and personal estate of the deceased, and costs of action against the defendants.

The defence stated:—William M'Glynn left personal property, amounting in value to £1926 3*s.* 9*d.*, which consisted of stock-in-trade, good-will of business, shop debts, cash, and the saleable interest of two farms held by him as tenant from year to year, and he was seized of a house and premises in Bridge-street, held under a fee-farm grant, the value of which is estimated at £250. The deceased owed debts to the amount of £2272 9*s.* 2*d.*; the defendants were always ready to give full particulars of assets and liabilities. The defendants entered into possession of the property, and Edward M'Glynn managed the same down to February, 1891, since which date Patrick Joseph M'Glynn managed it. The defendants deny that Edward M'Glynn was appointed post-master as trustee, or by reason of his being trustee of the will, or that he made use of his position as such to have himself appointed. Since February, 1891, he carried on business on his own account, and not as trustee, in the town of Clara; but the defendants deny that any portion of the property of the testator was invested therein, and say that the said business was begun and was carried on by Edward M'Glynn, with his own money, and in premises of which he is tenant beneficially and not as trustee; he has, since February, 1891, ceased to manage the business of the testator, or in any way interfere therewith, and has not since that date drawn or been paid any salary for such management. The defendants deny that the business now carried on by Edward M'Glynn has injured the

V.-C. 1893. MOORE v. M'GLYNN.

business of the testator. Further, it was provided by the will that the defendants, as trustees, should have power to arrange for the settlement of the said testator's children as they might determine, and in case they disagreed, he willed that the parish priest, the Rev. M. Gaffney, should have full and absolute power to determine both as to the amounts payable and times of payment; and a sum of £10 was paid to the plaintiff, in part discharge of her claim against the assets of the testator, and she received goods, part of such assets, to the value of £17 10*s.* 10*d.*; and having regard to the total amount of said assets, the defendants, in the *bona fide* exercise of the discretion and power given to them by the will for the settlement of the testator's children, decided that the sum of £87 10*s.* 10*d.* should be paid to the plaintiff, in full and complete satisfaction and discharge of her claims against the assets, which sum was to be made up of the said sums of £10 and £17 10*s.* 10*d.* and a further sum of £60. The defendants tendered the said sum of £60 to the plaintiff, but she returned same. The defendants deny that they have been guilty of any default or breach of trust, or that the testator's estate has been reduced in value.

The plaintiff replied, joining issue upon the defence, and also pleading that the exercise of the discretion and power alleged in the defence, if made at all, was not made *bona fide*, but for the purpose of depriving the plaintiff of her rights in respect of the property of the deceased, and for the purpose of covering the defendants' breaches of trust.

The will was in the following terms:—I bequeath all my property of whatsoever kind to my brother Edward M'Glynn and my son Patrick Joseph M'Glynn, to be held by them in trust, and to be managed by them for the benefit of my wife and children. Secondly, I will that my brother Edward M'Glynn have the right of maintenance and lodging in my house, and that he receive an annual salary of £60 for the management of the business; and I further will that he be entitled to invest any money that he may have in the business and receive 5 per cent. thereon; and I will that the two aforesaid trustees have power to arrange for the settlement of my children as they may determine; and in case they disagree, I will that the parish priest, Rev. M. Gaffney, have full

and absolute power to determine both as to amount payable and times of payment. I appoint the aforesaid trustees executors of this my last will and testament.

Probate was on the 13th January, 1888, granted to the executors, the gross value of the assets being sworn at £2526 3*s.* 9*d.*, including book-debts, £1100; debts due on promissory notes, £90; stock-in-trade and farming stock, £1069 13*s.* 9*d.*; good-will of business, £50; and farms, £90. The debts due by the testator were put down as amounting to £2250 13*s.* 2*d.*

The case was tried on oral evidence, the following note of which does not go into details on disputed matters of fact.

Evidence of the plaintiff and her witnesses:—At the time of the testator's death his brother Edward was not living with him in the Bridge-street premises, but he took part in managing the business: these premises were not licensed. The testator carried on a grocery, drapery, hardware, and bakery business there; the plaintiff assisted; the testator was also postmaster at Clara, the post office business being carried on upon the same premises; the post office was separated from the shop by a partition; it had a separate door, and there was no communication for the public between it and the shop; the testator and the plaintiff's sister Ellen worked the post office business. On the testator's death Edward M'Glynn came to live at the Bridge-street premises; Patrick Joseph M'Glynn had been away for some five or six years before the death; he returned in 1890; up to this date Edward M'Glynn managed the business, and supported the family; he was appointed postmaster soon after the testator's death; he said the money from it would go into the business. Ellen partly managed the post office until shortly before the plaintiff's marriage in February, 1891; she never got a salary; the postmaster was allowed for an assistant, and Edward continued to keep a paid assistant as before the death. About the time of the plaintiff's marriage Edward M'Glynn took premises for himself in Church-street, Clara: they were about the length of a street from the Bridge-street premises; he extended the new premises and stocked them, and transferred the post office business to them; they were licensed premises, and he carried on there a grocery, hardware, and spirit business; except drapery he sold everything there which

V.-C. 1893. MOORE v. M'GLYNN.

was sold at the old premises. Before he left the old premises he said he had taken £400 out of the testator's business when he was starting his own. The bank account had, after the testator's death, been kept in the name of Edward M'Glynn; in April, 1891, it was changed to that of Patrick Joseph M'Glynn; Edward M'Glynn purchased the new premises for £500, and paid for them by cheque. [Cheques 16th December, 1890, for £125, and 23rd December, 1890, for £375, drawn by him, produced.] The testator was in debt at his death; he had an overdraft at the bank, and there was a debt of over £600 due to Messrs. Goodbody. From the time Edward opened the new premises the old business was carried on by Patrick Joseph M'Glynn; he said Edward had sent out circulars to the old customers; he had seen them; there was a falling off in the old business; many of the customers left, and the lodgments in bank diminished; the plaintiff left Bridge-street after her marriage; she received £10 from Patrick; she returned the £60 sent to her.

A letter in the following terms, dated the 24th November, 1887, was written by Edward M'Glynn to the Secretary, General Post Office, Dublin:—"I beg to make application to you for the position of sub-postmaster of Clara, which has become vacant through the death of my brother. I have been living with him, and conducting a large grocery business for him during the last fifteen years, and he has bequeathed all his property in trust to me and his son for the benefit of his wife and children. If you are pleased to give me the appointment the business will be carried on in exactly the same premises and in a satisfactory manner. I can obtain references of the highest character from both the Protestant and Catholic clergymen of this parish, and also from the Messrs. Goodbody of this town. Hoping that you will entertain my application favourably, I am . . ."

On the 4th January, 1888, a notification of the nomination of Edward M'Glynn as sub-postmaster at Clara was sent from the Secretary, Post Office, London, to the Irish Post Office Secretary.

Patrick Joseph M'Glynn deposed:—I was in employment in Dublin at the time of the testator's death. I afterwards left my employment and went to Clara in consequence of a communication from Edward. I went to take up the management of our

father's business. I took over the management about March, 1891. I ceased to sell mill stuffs on credit, and now practically do a cash business. Edward sent out circulars to the public by post and hand. I was no party to that. We did not lose one customer. In 1891 Edward and I took stock; we valued all the property of the testator; we estimated it at £1997 2*s.* gross, including the farms; there were debts amounting to £1769, leaving a balance of £228 2*s.*; we arrived at the decision that the proper sum to give the plaintiff over what she had received already was £60: this was done in the *bona fide* exercise of the discretion given to us by the will; a cheque was sent, but it was returned by her; Edward told me he was going to set up business for himself; I did not remonstrate; I discovered about the circular after the opening of the new business; I believe I read it; the substance of it was principally about the liquor business; there was something about groceries; I took for granted some of our customers might have got them; the old business is paying as well as ever; the income tax authorities think it produces £200 per annum; we appealed, but got nothing by it; the empty house, without the stock, is worth £250; there were ten of us in family; we intended to give equally.

Edward M'Glynn deposed:—In the end of 1890 I bought the interest in the new premises for £500; I borrowed £300 from Messrs. Baker, Wardell & Co.; it was advanced on my own personal account; they were aware I was setting up for myself; after my brother's death I opened a bank account in my own name; I never had any other account; the old account of the testator was kept as an open balance, a new clear account being opened for me; my salary as postmaster passed into the accounts; I did not make any use of it; there was £100 due to me for arrears of salary at the time of my brother's death; the profits of the business were expended for the benefit of the family. The £500 paid for the new premises was my own; I received from Messrs. Baker, Wardell & Co. a cheque for £300, which I lodged to my account, and drew cheques for the purchase-money; the customers of the old firm did not come to my establishment: one or two came to me, chiefly for liquor; I sell bread; I do not bake it, I get it from the old shop; we offered the plaintiff £60, which

V.-C. 1893.

MOORE v. M'GLYNN.

was more than one-tenth, as the business might be increasing; the balance of the purchase-money of my shop I got in my brother's business; about £369 arrears of wages were due to me; the old business was very slightly injured by my shop; the circulars had no effect.

Edward M'Glynn's explanation of the circular was that it did not refer in terms to the old business; that it was a general circular soliciting custom for the business which he was himself starting, and that this not being the same as that of the testator, there could be no misconception. Evidence was also given as to the loan by Messrs. Baker, Wardell & Co., of the £300, which was made by one cheque and without security. They had an account with the testator, and a new account was opened with Edward M'Glynn in December, 1890, starting with this loan. There was a balance due on the old account of £340 in December, 1890. In June, 1891, it was £391. The £300 loan was not included in this; the two accounts were quite separate. The testator was also indebted at the time of his death to Messrs. Goodbody in about £600; the balance was left outstanding; Edward continued to deal with them, as did also Patrick; the business rather decreased; over £700 remained due; they required Patrick to pay cash, and he did so.

The defendant Edward M'Glynn was quite willing to retire from the trusts.

D. B. Sullivan, Q.C. (with him *Ignatius J. O'Brien*), for the plaintiff, cited *Bennett* v. *The Gaslight and Coke Company* (1), following *Hamilton* v. *Wright* (2); *Williams* v. *Stevens* (3), to show that a trustee must not do anything which places him in a position inconsistent with the interests of the trust, and cannot retain any benefits acquired by him by so doing: *Adair* v. *Shaw* (4), as showing that a trustee will be chargeable for a breach of trust, though he may have derived no benefit from it. As to the liability of Patrick Joseph M'Glynn: *Booth* v. *Booth* (5); as to the power of the Court to interfere with the decision of the trustees in

(1) 52 L. J. (N. S.) Ch. 98.
(2) 9 Cl. & F. 111.
(3) 12 Jur. (N. S.) 952
(4) 1 Sch. & Lef. 243, 272.
(5) 1 Beav. 125.

reference to the amount of the plaintiff's share: *Davey* v. *Ward* (1); *Tempest* v. *Lord Camoys* (2); as to granting an injunction though not prayed for: *Norton* v. *Gover* (3), the analogous case of a receiver.

Meredith, Q.C., and *Denning*, for the defendants:—

The defendants had, under the terms of the will, a discretionary power to fix the amount payable to the plaintiff; they must have had as full powers while agreeing, as the umpire would have had if they had disagreed; and the Court will not interfere: *Boulger* v. *Smith* (4); *Tabor* v. *Brooks* (5); *Tempest* v. *Lord Camoys* (2); *Gray* v. *Gray* (6). In *Davey* v. *Ward* (1) the three children were absolute legatees of the £3000, and nobody else would have an interest in it unless they all died under age, and there was in the will an express direction to the trustees to apply the whole, or such part as they thought fit, of the income for the maintenance of the children. Under the circumstances, the Court did not think the trustees had properly exercised their discretion. There is no wilful default here. Wilful default is the neglect to get in assets which might have been recovered. The office of postmaster cannot be treated as an asset, nor can the profits arising from the defendant's appointment be subject to any trust. William M'Glynn's postmastership was a personal office, not lasting beyond his own life, and there is no case in which an office held by a testator, and terminating with his death, has been decided to be continued for the benefit of his estate. Moreover, this was a Crown office, unsaleable, and in which there could be no trafficking, and no trust can be attached to it: see 5 & 6 Ed. 6, c. 16; 49 Geo. 3, c. 126. There was nothing wrong in transferring the post office to the new premises, nor is there anything to prevent a trustee setting up in business on his own account with his own money.

O'Brien, in reply:—

The account of the property available for distribution was

(1) 7 Ch. Div. 754.
(2) 21 Ch. Div. 571.
(3) W. N., 1877, p. 206.
(4) 3 Ir. Jur. 249.
(5) 10 Ch. Div. 273.
(6) 13 Ir. Ch. Rep. 404.

V.-C. 1893.

MOORE v. M'GLYNN.

taken at a time when one of the trustees had been guilty of breaches of trust, and his interest was to shield himself, and he cannot now rely on it as an answer to the charges against him.

In appointing Edward M'Glynn postmaster, the authorities must have been influenced by the statements in his letter of application. In obtaining the postmastership for his own benefit he abused his position as trustee, and he has since, by removing the post office, violated the undertaking on which he obtained the appointment.

Edward M'Glynn interpreted the will as entitling him to allow his entire salary to accumulate in the business for over three years, to charge interest on it, and on the arrears due at the testator's death, and then suddenly to withdraw the entire, and at the same time to remove the post office to his own premises, he having, in the meantime, lived out of the trust estate. This was not proper conduct for a trustee in whom confidence was reposed by the testator. A partner setting up a rival business would not be allowed to solicit customers. It is far worse in a trustee to do so. The valuation made by the defendants, if binding on the plaintiff, would also be binding on the rest of the family, including the infant children. The business is admittedly making a profit of £200 a-year, which in three years would pay £60 to each of the ten persons interested, leaving the entire property, business, farms, and everything to one of the trustees under this valuation, made at a time when one of them had committed breaches of trust, and the other had acquiesced; and the result of the entire arrangement is that each trustee gets a prosperous business for himself. This cannot be the legitimate effect of the power in the will. Even if the trustees had power to make such an arrangement, that made by them was not fair or reasonable: a trustee guilty of a breach of trust cannot exercise a proper discretion. It is not necessary for the plaintiff to actually trace trust-money to the new business, or to prove that the trustees benefited from their breach of trust: *Adair* v. *Shaw* (1); nor is it necessary to prove actual loss to the trust estate: *Hamilton* v. *Wright* (2). Lord Brougham there says (p. 123):—"There cannot be a greater mistake than to suppose, as seems to have been done below, that a

(1) 1 Sch. & Lef. 243, 272. (2) 9 Cl. & Fin. 111.

trustee is only prevented from doing things which bring an actual loss upon the estate under his administration. It is quite enough that the thing which he does has a tendency to injure the trust; a tendency to interfere with his duty." And in *Bennett* v. *Gas Company* (1), Pearson, J., at p. 101, says:—"Now I ask whether what Mr. Blagden did in this case had or had not a tendency to injure the trust, or a tendency to interfere with the discharge of his duty to his *cestuis que trust?*" Here there has been actual loss to the trust estate by the removal of the post office, not confined even to the amount of the salary—it is an advantage to a shop to have a post office attached beyond the mere emoluments of the postmastership.

Though the office of postmaster may not be the subject of a trust, yet if a trustee has obtained profits by reason of his trust he cannot retain them for his own benefit.

The plaintiff has proved acts of misconduct on the part of Edward M'Glynn, entitling her to a judgment on the basis of wilful default, and to have him removed; and, being guilty of breaches of trust, he should pay the costs: Lewin on Trusts (1891), pp. 963, 964. His co-defendant stood by, and also entered into the arrangement by which they both profited.

[Counsel also dealt in detail with the figures showing the value of the property of the testator.]

THE VICE-CHANCELLOR:—

Dec. 13.

It is necessary to consider in the first place the defence that the trustees and executors in exercise of the discretionary power given them by the will "to arrange for the settlement of the testator's children as they may determine," have decided that the plaintiff's share of the assets amounted to £60, in addition to £10 cash and £27 10*s.* worth of goods which she received, and that they tendered the sum of £60 accordingly, which she refused to accept. The words of this clause are not clear, and do not with any precision express the extent of the power intended to be thereby conferred. "To arrange for the settlement of the children," if unexplained by the following clause, might fairly be construed as

(1) 52 L. J. (N. S.) Ch. 98.

V.-C. 1893. MOORE v. M'GLYNN.

applying only to the settlement of ascertained shares. But the defendants contend, and I think rightly contend, that this uncertainty is sufficiently explained away by the following clause, which provides that in case of disagreement the parish priest should have full and absolute power to determine both as to the amounts payable and the times of payment. As it is improbable that the umpire was intended to possess larger powers than those between whom he was to decide, it seems to me that his powers may be resorted to to explain the meaning of the power to the trustees, and that consequently they must be taken to have power to determine the amounts and times of payment. The rule applicable to such cases of discretionary power is that the exercise of such power will not be interfered with or controlled if it be regularly and honestly used. What was done by the trustees was to make out a statement of the available assets for distribution, and to decide that this amount should be divided into ten equal shares, giving each child one-tenth. The division into equal shares is free from objection. But, in my opinion, in the circumstances of this case it is going too far to contend that the ascertainment of the assets so to be divided is not subject to investigation by this Court. The trustees may have had full and absolute authority to arrange and settle the shares to be given to each child of the sum to be divided; but it would be dangerous to hold that there is no control over their ascertainment of the total amount. They would in such case be judges in their own cause. They had from the death of the testator the entire administration of the assets entrusted to them, including the management of the trading carried on by them. The amount distributable among the children of course depended on the due discharge of those duties, so that if their decision on that amount was to be conclusive, it would be in their power to protect themselves against liability for any default. It is not necessary for the *cestuis que trust* to prove any breach of duty by the trustees for the purpose of having accounts taken of the trust property, as their right to this results from the mere relation between them. I therefore hold, without going for that purpose into the charges made by the plaintiff against them, that their defence on this ground cannot be sustained. There must, therefore, be the usual accounts of the real and personal estate.

The plaintiff claims to have accounts taken not only of the actual receipts of the defendants, but of what they without wilful default might have received. It has been sought to extend this liability in the present case far beyond its proper limits; for it was contended that it applies to possible loss of profits in trading, occasioned by the setting up of a rival business as complained of here. But the very words of the prayer here, which are in the form invariably used, seem sufficient to exclude this contention. Under this prayer, according to the settled practice, an executor or administrator, or a trustee can be charged with assets or trust funds actually in existence, which either came to his hands, or which, by his misfeasance or negligence as to getting them in, have been lost to the estate. I do not mean to say that trustees or executors cannot be held liable for losses sustained by such misconduct as here alleged, but I hold that it cannot be done under a mere direction as to wilful default. Another insuperable objection is that by the settled practice of the Court a plaintiff seeking relief against wilful default must allege in pleading some specific act of wilful default, or, at least, make a strong case for inquiry. Here there has not been any proof of wilful default, nor even any ground for inquiry as to it, in the view that I have expressed of its nature. I shall therefore dismiss the action so far as it seeks to have the accounts so taken.

The plaintiff is entitled to have an account of the profits of the business of the testator carried on by the defendants from his death in the testator's premises in Bridge-street, Clara.

The next relief prayed is an account of what portion of the trust property has been invested by the defendant Edward M'Glynn in his own business, and a declaration that any trust funds or assets so invested were bound by the trusts of the will. The case put forward by the plaintiff as to this was that the defendant Edward M'Glynn purchased the premises in Church-street, Clara, in which he set up business with money taken by him out of the testator's assets. This was positively denied by Edward M'Glynn, and in the main, at least, he has completely disproved the charge. The sum paid by him for the purchase of the new premises was £500, which was paid in two sums of £175 and £325, into the Court of Bankruptcy, where the purchase was

V.-C. 1893.

MOORE v. M'GLYNN.

made. He has proved to my satisfaction that Edward M'Glynn borrowed from Messrs. Baker, Wardell & Co., on his own personal security, the sum of £300 for the purpose of this purchase, and that they lent it to him as a mere act of kindness, and that he applied it towards payment of the £325. It appears that he passed the cheque he received for the £300 into his bank account, which contained also the cash transactions of the business of the testator, and immediately drew a cheque for the £325 and paid it into the Bankruptcy Court. Then as to the other £200 composed of the first payment of £175, and £25 of the second payment, his case is that both these sums, which were paid out of the same bank account, were his own private moneys. He has made out his own personal account with the business from the bank account, showing that he owned a sum of £100 arrears of his salary as manager of the business in the testator's lifetime (on which he has, probably without sufficient ground, charged interest amounting to £15), and also £200, being the salary of £60 a-year, to which he was entitled under the will, and on which he rightfully charged the interest given him by the will, amounting to £12, and against these sums he shows credits to which the business was entitled, and thus balances the account. No attempt was made to dispute any of these items except the £15 interest, which he seems to have claimed on the ground that the testator gave him by the will interest on any money he might have in the business, which he thought gave him a retrospective claim. Save as to this item he has, so far as the evidence before me goes, disproved the plaintiff's charge with which I am now dealing. But in order to have this question fully investigated, I shall direct an inquiry at Chambers, whether any, and if so what, portion of the personal estate of the testator was invested by the defendant Edward M'Glynn in his own business.

The next relief prayed is the removal of the defendants from the trusteeship. No case has been proved which would call for the removal of the defendant Patrick J. M'Glynn, whose conduct appears to me to be free from impropriety. When his father died he was living in Dublin in respectable commercial employment. He allowed his uncle and co-trustee to remain in the management of the testator's business, which he had managed for

several years, in conjunction with his brother, the testator, and who by the will was directed to be continued in this management, and was thereby shown to have enjoyed the fullest confidence of the testator. There was, therefore, no default on the part of Patrick in leaving the management in his hands. Then, when Edward M'Glynn contemplated setting up in business for himself, Patrick gave up his employment in Dublin, and in February, 1891, returned to live in the testator's house at Clara, and took charge of the business there. I do not find any evidence to bring the case within the rule of this Court, that one trustee standing by, and permitting his co-trustee to commit a breach of trust is liable for a breach of trust so committed. I therefore hold that no case has been made for his removal from the trusteeship, and shall dismiss the action with costs, so far as it prays for his removal.

Then as to the defendant Edward M'Glynn. He has been accused of gross breaches of trust on several grounds. The chief complaint is for setting up in business in the same town, which, to a considerable extent, was of the same nature as that carried on in the testator's house of business. I have not been referred to, nor am I aware of, any case deciding that an executor or trustee of a will carrying on the business of his testator is disabled from setting up a similar business in the same locality on his own account. If he in any way represents to the public that his own business is the same concern as that of which he is trustee, as by using the name of the testator's concern in connexion with his own business, or otherwise seeking to draw away the customers to his own shop, there might be some ground for an application to restrain him from so doing. But I am not prepared to hold that a trustee is guilty of a breach of trust in setting up for himself in a similar line of business in the neighbourhood, provided that he does not resort to deception, or solicitation of custom from persons dealing at the old shop. I have no sufficient proof here of any such malpractices by the defendant Edward M'Glynn. It is admitted that he did, on first opening his shop, send out circulars in the town, stating his having done so. No copy of the circulars has been proved, and I must take them to be such as described by the defendant in his uncontradicted evidence, and as not containing any such misleading statements. It is plain that the setting up a

V.-C. 1893. MOORE v. M'GLYNN.

shop in a small town to a certain extent in rivalry with another must tend more or less to injure the business of any similar shop in the locality, and I think there would be an inconsistency between the duties of the defendant Edward, as trustee and manager of the testator's business, and the necessary personal interest which he must take in his own. I do not think I could, under such circumstances, grant an injunction to restrain him from carrying on his own business, or direct an inquiry whether any damages were occasioned by his doing so, but I am of opinion that his new position disqualifies him from remaining any longer a trustee, and it would have been better for him to have procured his removal from the trusteeship before setting up for himself. He should not be continued in a position where his duties and his self-interest may conflict. He has himself expressed by his counsel his willingness to retire from the trusts, and I shall remove him from being a trustee and manager, and appoint a new trustee in his place. I shall not appoint a receiver or manager of the business; the effect of my doing so would probably be ruinous to the business, and I have no reason to be dissatisfied with the management by the defendant Patrick J. M'Glynn.

There was another matter which was made the subject of very strong charges against Edward M'Glynn, namely, his having obtained, on the death of the testator, the office of local postmaster at Clara, which had been held for many years by the testator, who carried on the post office business in a part of his shop. He applied to the Postmaster-General for the appointment by a letter, stating his qualifications, and that the business could be still carried on in the same office, and that he was one of the trustees of his brother's will. He got the appointment, and the business was carried on as before, and he drew the salary and emoluments, and allowed them to go into the general trust fund. I cannot see any impropriety in his having done this. There was nothing false in his representations, and it must be presumed that he was appointed upon his personal fitness to hold the office. The post was one in the gift of the Crown, and could not be made the subject of purchase, or of any dealing in the nature of purchase. He was absolutely entitled for his own personal benefit to the emoluments of the office, and any trafficking with them would have been

illegal and void. I cannot give the slightest countenance to the proposition that there could be anything like a graft upon the former tenure of it for the benefit of the testator's assets, or any liability on the part of the officer to account for its profits. When he received his salary he was at liberty to do what he pleased with it, and it was his voluntary act to throw it into the fund for the benefit of his *cestuis que trust*. The utmost of his liability would be to payment of compensation for the use and occupation by him as postmaster of the office on the testator's premises. But when he set up his new shop he transferred to it the post office, which he must have got leave from the post office authorities to do, and thenceforth he performed the business there, and retained the emoluments for his own benefit. This I consider he had full right to do, as the office was a personal one, and he was the only person recognized by the Crown as the holder of it, liable to perform the duties, and entitled to receive the salary. Strictly speaking, he would have been entitled to the emoluments of the office, and during the period for which the business of that office was carried on by Edward M'Glynn upon the premises of the testator, he would be chargeable with a reasonable sum for the use of the post office premises, the result of which would have been less beneficial to the testator's estate than what was done. I think it would be wrong to permit him now to go back of this course of dealing, nor does he seek to do so. I shall, therefore, not disturb the accounts in this respect; and, on the other hand, I shall not direct him to be charged for the use of the post office premises in the plaintiff's shop, thus allowing one to go against the other.

The writ of summons asks for an injunction against the defendants, but does not say what injunction is sought. In the prayer of the statement of claim no such relief is sought. The plaintiff, by her counsel, on the trial, appeared to expand this into an injunction against the defendant Edward M'Glynn carrying on any business in the town of Clara, similar to that carried on by the testator, but, on grounds I have already stated, I decline to do so, and shall dismiss the action so far as it seeks an injunction against him. No case whatever has been made for an injunction against Patrick J. M'Glynn, and this must be similarly dealt with, except that I must do so with costs.

V.-C. 1893.

MOORE v. M'GLYNN.

It was also sought to have the new premises, purchased by Edward M'Glynn in Church-street, Clara, and the business carried on by him there, affected with a trust for the benefit of the testator's estate, and to have an account of his trading there. I consider this to be without foundation, and shall dismiss so much of the action accordingly, and with costs.

The judgment in the case is as follows :—Declare that, notwithstanding the alleged exercise by the defendants of the power in the testator's will, given to the executors and trustees thereof for the settlement of the testator's children, by which the share of the plaintiff of the testator's assets was decided to be the sum of £87 10*s*., the plaintiff is entitled to have the accounts taken, which are hereinafter directed, and accordingly let the following accounts and inquiries be taken and made :—

1. Let the real and personal estate of testator be administered, and the usual accounts taken.

2. Dismiss the action with costs, so far as it seeks to have the accounts taken with wilful default.

3. Usual account of the trading of the testator carried on upon his premises in Bridge-street, Clara, by defendants, or either of them, since his death, and direct that, in taking such accounts, any sums received by defendant Edward M'Glynn, for salary or emoluments of the office of postmaster, shall not be included, save so far as the same shall appear to have been actually brought into account by said Edward M'Glynn, and that no sums shall be charged against him for the use or occupation of any portion of testator's said premises, for the carrying on the business of the said office.

4. Inquiry whether any, and if so what, portion of the testator's assets was invested by said Edward M'Glynn in his own business, or in the purchase of the premises in Church-street, in which such business was carried on by him.

5. Dismiss the action, with costs, so far as it seeks to remove defendant Patrick J. M'Glynn from being a trustee of the testator's will. Discharge defendant Edward M'Glynn from the further performance of the duties of trustee of the said will, and manager of the said testator's business under the same; and adjourn to Chambers to appoint a new trustee of said will in his place, jointly

V.-C. 1893.

MOORE v. M'GLYNN.

with defendant Patrick J. M'Glynn. Make no order at present for the appointment of a receiver or a manager of said business. Dismiss the action (1) so far as it seeks an injunction against the defendants, and also so far as it seeks to affect the business carried on by Edward M'Glynn in the premises at Church-street, with a trust for the benefit of the testator's estate.

Adjourn further consideration, and the costs, save those hereinbefore awarded.

Solicitor for the plaintiff: *D. M. Moriarty.*

Solicitors for the defendants: *Hoey & Denning.*

D. M'C. M.

VALENTINE *v.* FITZSIMONS.

(1892. No. 856.)

M. R. 1893.

Jan. 19, 20. Feb. 14.

Will—Power of appointment by trustees amongst blood relations of testator living at a stated period—Gift in default of appointment to next-of-kin then living, exclusive of a named person—Time for ascertainment of class—Meaning of word "then."

A testator (pursuant to a power) appointed certain property to his son W., subject to a perpetual annuity thereout to his son G., and directed that the residue of his property should, at the death of his wife, or at the expiration of ten years from his death, whichever should last happen, be held by his trustees on trust as to one moiety for his son W. absolutely, if he should be then alive and should not have incumbered the property appointed to him by the testator; but if he should be then dead, or should have incumbered the said property, then in trust for all or any of his relations by blood then living other than his son W., as the then trustees of his will should appoint; and in default of appointment, in trust for the persons who would then be his next-of-kin, according to the statutes of distributions, if his son W. were then dead, such persons to take as tenants in common in the shares prescribed by the said statutes. The testator directed that the other moiety should be held on trust for his son G. absolutely, with like gifts over, in the event of G. being then dead, or having anticipated his annuity, to the testator's blood relations or next-of-kin, to the exclusion of G.

The testator died in 1872, leaving a widow and his two sons W. and G. surviving. The widow died in 1873. G. anticipated his annuity, and died in

(1) The judgment as made up contained the words "with costs."

M. R. 1893. VALENTINE v. FITZSIMONS.

1876, leaving one child. W. incumbered his share, and died in 1879, leaving three children. No appointment was made by the trustees of the will at the expiration of the period of ten years from the testator's death, and new trustees were appointed in 1873, and again in 1891 :—

Held (on an originating summons taken out by the trustees) :—1, that the present trustees could not exercise the power of appointment ; 2, that the persons to take the property in default of appointment were to be ascertained at the expiration of the ten years from the death of the testator, and that it was divisible between the grandchildren *per stirpes*.

Wharton v. *Barker* (4 K. & J. 483) and *Re Natt* (37 Ch. Div. 517) followed.

ADJOURNED SUMMONS.

This was an application by the trustees of the will of George Fitzsimons, to have the following questions arising in the administration of the estate of the testator determined :—

1. Whether the trustees or any of them were entitled and empowered to appoint the residue devised and bequeathed by the said will among the testator's grandchildren equally or in such shares as the said trustees desired.

2. In case the said trustees were not entitled or empowered to appoint the said residue, then amongst what persons and in what shares or proportions the said residue was divisible.

The facts of the case were as follows :—Under the will of his brother Nicholas Fitzsimons, dated 19th March, 1859, the testator George Fitzsimons had a power of appointment over the residue of his brother's property in favour of his own children or grandchildren. Nicholas Fitzsimons died 14th July, 1859. The testator George Fitzsimons died on 21st November, 1872, having made his will on 3rd June, 1872.

By this will the testator bequeathed the residue of his property to his friends Alexander M'Laine, John M'Kee, and George M'Auliffe, their heirs, executors, administrators, and assigns, upon trust to pay his debts and funeral and testamentary expenses, and a sum of £10 each to his said trustees. The testator then recited the power of appointment under his brother's will, and appointed all the said residue of his brother's property to his son William Boyle Fitzsimons, his heirs, executors, administrators, and assigns, subject, however, and charged with payment of a perpetual annuity of £600, commencing at his death, which he bequeathed

to his son George Fitzsimons, his heirs, and assigns, as his share of the said trust estate. He then directed his said trustees to hold the residue of his own property upon trusts for sale or conversion, and to pay the income thereof to his wife for life, and upon her death, if his grandson Nicholas Fitzsimons, the infant son of his son William, should be then alive, he directed that his said trustees should, out of the said residue, set apart a sum of £500, and hold the same in trust for his said grandson, with power to them in the event of his said grandson being then a minor to apply the income for his maintenance or accumulate it as they thought fit during such minority. Subject as aforesaid, he directed that the residue of his real and personal property should at the death of his wife or at the expiration of ten years from his death, whichever should last happen, be held and applied as follows: that is to say, as to one moiety, if his son William Boyle Fitzsimons should be then alive, and should not have diminished the amount or value of the property thereinbefore appointed to him as aforesaid by incumbrances, expenditure, or otherwise, to a greater extent than the sum of £3000, in trust for his said son William Boyle Fitzsimons; but if he should be then dead, or should have diminished the amount or value of the said appointed property to a greater extent than the sum of £3000, in trust for all, or any one or more, exclusively of the others or other, of his relations by blood then living, other than and except his said son William Boyle Fitzsimons, and in such manner, shares, and proportions as the then trustees or trustee of his will should by deed appoint, and in default of appointment in trust for the person or persons who would then be his next-of-kin, according to the statutes for the distribution of the personal estates of intestates, if his said son William Boyle Fitzsimons were then dead, such persons, if more than one, to take as tenants in common in the shares prescribed by the said statutes. And as to the other moiety of his property, if his said son George Fitzsimons should be then alive, and should not have in any manner, or to any extent, diminished or anticipated either by incumbrances, expenditure, or otherwise, the amount or value of the said annuity thereinbefore appointed to him, in trust for his said son George Fitzsimons absolutely. But if he should be then dead or should have in any manner or to any extent diminished or

M. R. 1893.

VALENTINE *v.* FITZSIMONS.

anticipated the amount or value of the said annuity, in trust for all, or any one or more, exclusively of the others or other, of his relations by blood then living, other than and except his said son George Fitzsimons, and in such manner, shares, and proportions as the then trustees or trustee should by deed appoint, and in default of appointment, in trust for the person or persons who would then be his next-of-kin according to the statutes of distribution of the personal estates of intestates, if his said son George Fitzsimons were then dead, such persons, if more than one, to take as tenants in common in the shares prescribed by the said statutes.

The testator further directed that if his wife should die within the said term of ten years from his death, the residue of his property should, after her death, be accumulated till the expiration of the said term, and the accumulations should be added to and form part of the *corpus* of the said residue, and that the persons or person who should be trustees or trustee of his will at the death of his wife, or at the expiration of the said period of ten years from his death, whichever should last happen, should inquire and be the sole judges or judge, and should decide whether the said William Boyle Fitzsimons should have then diminished the amount or value of the property thereinbefore appointed to him to a greater extent than the sum of £3000, and whether the said George Fitzsimons should have in any manner, or to any extent, diminished or anticipated the amount or value of the said annuity thereinbefore appointed to him, and that the decisions thereon of the said trustees or trustee should be conclusive and final, and they or he should not incur any responsibility by reason of their or his decisions therein, or by reason of their or his acting on such decisions.

The testator appointed the said Alexander Mac Laine, John M'Kee, and George M'Auliffe, his executors. Alexander Mac Laine and John M'Kee renounced and disclaimed the trusts of the will, and probate was granted to George M'Auliffe only on the 1st January, 1873.

The testator's widow died on the 15th June, 1873. On the 17th April, 1873, William Valentine and William John Nicholl were appointed new trustees by George M'Auliffe, pursuant to the statutory power.

The testator had only two children, namely, the two sons mentioned in the will. George Fitzsimons incumbered his annuity by deed of the 3rd February, 1875, and died the 3rd November, 1876, leaving a widow and one child, Norah Fitzsimons, born in the year 1873.

William Boyle Fitzsimons failed in business, and diminished the said property to an extent greater than £3000. He died on the 16th October, 1879, leaving a widow and three children—Nicholas, born in 1869; Margaret, born in 1872; and Henry William, born in 1874.

William J. Nicholl, one of the new trustees of 1873, died on the 1st August, 1887. George M'Auliffe, the original trustee, went abroad, and by deed of 25th April, 1891, appointed Nicholas Fitzsimons, the son of William Boyle Fitzsimons, and Stuart C. Kelly, as trustees, along with William Valentine, the other trustee appointed in 1873.

The only next-of-kin of the testator living, ten years after his death, were his grandchildren, namely, Nicholas Fitzsimons, Margaret Fitzsimons, Henry William Fitzsimons, and Norah Fitzsimons. Margaret Fitzsimons, H. W. Fitzsimons, and Norah Fitzsimons were, at the time of the application, still minors.

The present trustees, if advised that they had power to appoint the residue, were willing to appoint it amongst the said grandchildren in equal shares; but they took out this summons to have the questions raised by it determined.

G. A. Hume, for the trustees of the will.

Piers F. White, *Q.C.*, and *John Stanley*, *Q.C.*, for Norah Fitzsimons:—

1. The present trustees cannot now exercise the power of appointment; it was given to "the then trustees," *i.e.* to those who were trustees at the expiration of the period of ten years from the death of the testator; and there should have been a timely exercise of the power by them. [They cited *Cole* v. *Wade* (1); *Tempest* v. *Lord Camoys* (2).]

2. No appointment being now possible, the residue is divisible

(1) 16 Ves. 27. (2) 21 Ch. Div. 571.

M. R. 1893. VALENTINE *v.* FITZSIMONS.

amongst the four grandchildren, who take *per stirpes*, i. e. Norah Fitzsimons takes one moiety, and the other three grandchildren the other moiety: *In re Natt* (1).

Twigg, *Q.C.*, and *Walker Craig*, *Q.C.*, for the children of William B. Fitzsimons:—

1. The present trustees can exercise the power of appointment. The gift to the original trustees is to them, "their heirs, executors, administrators, and assigns." The testator afterwards uses the words, "the trustees or trustee for the time being of this my will," and the words, "the said trustees or trustee." The words "the then trustees" meant those who were trustees when the power of appointment was to be exercised, not necessarily those who were trustees at the time of the death of the testator.

2. The present trustees say that they will appoint to the grandchildren equally. The same result will follow if, in default of appointment, they take *per capita*. The decision of North, J., in *In re Natt* (1) took the profession by surprise. The statement of the law in Williams on Executors was always followed. [THE MASTER OF THE ROLLS referred to the note in Watkins on Descents, p. 259.] In the case referred to by North, J., the point did not really arise. The residue here is to be divided amongst the testator's "relations by blood." In *Withy* v. *Mangles* (2) the division was to be amongst the "next-of-kin," and it was held that it meant nearest of kin by blood. There was no reference there to the statutes of distribution.

[THE MASTER OF THE ROLLS: But here the gift in default of appointment is "for the persons who would then be my next-of-kin according to the statutes for the distribution of the personal estate of intestates." See, as to the meaning of such words, *Bullock* v. *Downes* (3), and *Day* v. *Day* (4).]

The state of the family at the death of the testator is the thing to consider. William and George were both alive. William had then only two children, and George had none. William's moiety would go to the testator's next-of-kin, exclusive of William, that is, to William's children and George, and George's moiety

(1) 37 Ch. Div. 517.
(2) 10 Cl. & F. 215.
(3) 9 H. L. Cas. 1.
(4) Ir. R. 4 Eq. 385.

would go to William alone. The intention of the testator was to cut out William if he was alive, and that his children should come in in his place. The cases prior to *Bullock* v. *Downes* (1) are of no authority; the decision of the House of Lords in that case put an end to the conflict of authority which existed. *Wharton* v. *Barker* (2) was before *Bullock* v. *Downes* (1). *Day* v. *Day* (3) is as near this case as any. *Morley's Trusts* (4) was a different case. In *Sturge* v. *Great Western Railway Company* (5), Hall, V.-C., inferred that there was an intention to create an artificial class. If the proposition stated there is meant to be put broadly, it is contrary to *Bullock* v. *Downes* (1). Even if the class is to be ascertained not at the death but at the expiration of the ten years, it is submitted that representation under the statutes of distribution is excluded by the words of the will, and that the grandchildren take *per capita*.

John Stanley, Q.C., in reply:—

1. The power of appointment was given to the persons who were trustees at the expiration of the ten years, and not to the trustees of the will generally. The intention of the testator was to keep the property intact for a definite period; at the expiration of that period he empowers "the then trustees" to give away the shares intended for his sons to blood relations. This power of selection enabled the trustees to go outside the statute of distributions. The word "relations" is not confined to next-of-kin. In the case of *Cruwys* v. *Colman* (6) this is laid down by the Court. [THE MASTER OF THE ROLLS: The word there is "family," the meaning of which I had to consider in *Commissioners of Charitable Donations* v. *Decy* (7).] Sir W. Grant there states:—"The Court of Chancery, however, in cases of bequests to "relations," has, upon grounds of convenience, adopted the rule of the statute of distributions; and though, where a power of selection is given, the party may, according to *Harding* v. *Glyn* (8), go beyond that rule, it is adhered to wherever the execution devolves upon the

(1) 9 H. L. Cas. 1.
(2) 4 K. & J. 483.
(3) Ir. R. 4 Eq. 385.
(4) 25 W. R. 825.
(5) 19 Ch. Div. 444.
(6) 9 Ves. 319.
(7) 27 L. R. Ir. 289.
(8) 1 Atk. 469.

M. R. 1893.

VALENTINE *v.* FITZSIMONS.

Court." Eleven years have elapsed since the expiration of the ten years, and of the three present trustees one only was a trustee at the expiration of that period. The "then trustees" were to make inquiry whether the sons had incumbered their shares. It would be contrary to the intention of the testator that the present trustees should have the power of selection.

2. Where a testator has used words from which the Court can gather that he intended that the next-of-kin were to be ascertained at a different period than at his death, the Court will give effect to that intention: *Long* v. *Blackall* (1); *Wharton* v. *Barker* (2). That case is not overruled by *Bullock* v. *Downes* (3), where the words of the will were different. In *Wharton* v. *Barker* (2) the words were "the persons that shall *then* be considered as my next-of-kin," whereas in *Bullock* v. *Downes* (3) the words were "as would, by virtue of the statutes, have become entitled." The word "then" is used throughout this will as an adverb of time, and cannot mean "thereupon," or "in that case," as it was held to mean by Sir Edward Sullivan in *Day* v. *Day* (4). See *Hunter* v. *Tedlie* (5); *Sturge* v. *Great Western Railway Company* (6), *per* Hall, V.-C.; *Mortimore* v. *Mortimore* (7); Theobald on Wills, p. 265; Jarman on Wills, vol. ii., p. 232. The estate was to be distributed at the death of the testator's widow, or at the expiration of ten years from his death, whichever should last happen. The widow died before the expiration of the ten years, and the class to take is to be ascertained at the expiration of that period.

Feb. 14.

THE MASTER OF THE ROLLS [after stating the facts of the case proceeded as follows]:—

I have not often met a will more difficult to construe than this, having regard to the fact that the difficulty is a single one, and depends upon only a few words.

For the plaintiff the case is presented to me as being free from ambiguity, and as turning (subject to the question as to the right of the present trustees to appoint) merely on whether the next-of-

(1) 3 Ves. 486.
(2) 4 K. & J. 483.
(3) 9 H. L. Cas. 1.
(4) Ir. Rep. 4 Eq. 385.
(5) 7 L. R. Ir. 448.
(6) 19 Ch. Div. 444.
(7) 4 App. Cas. 448.

kin of the testator, who were to be ascertained as of the date of ten years after his death, took *per capita* or *per stirpes*. At that time both his sons were dead, one leaving one child, and the other three. If this had been the question, no doubt it would have been easily solved; since, notwithstanding an opinion long prevailing to the contrary, it is now clearly decided by *In re Natt* (1), in consonance with the view of Mr. Joshua Williams (Watkins on Descents, 4th Ed., p. 259, Note [I]), in which I strongly concur, that when an intestate leaves grandchildren only they take on the principle of representation *per stirpes*, and not *per capita*. Had there been no other matter for decision, Norah Fitzsimons would clearly take one moiety, and the other three minors the other moiety, of the testator's residuary personal estate, each half of which would go in the same way.

But there is another and far more difficult question behind this, viz. whether the testator's next-of-kin are to be ascertained as of the date I have mentioned (ten years after his death, in the events which have happened), or at his death. This depends on the language of the will itself. The words are as follows:—"In trust for all or any one or more, exclusive of the others or other of my relations by blood then living, other than and except my said son William Boyle Fitzsimons, and in such manner shares and proportions as the then trustees or trustee of this my will shall by deed appoint." No appointment was, in fact, made, and the question arises, can the present trustees appoint now; if they can, they have stated how they propose to appoint. The clause goes on:—"And in default of any such appointment, and so far as no such appointment shall extend, in trust for the person or persons who would then be my next-of-kin, according to the statutes for the distribution of the personal estates of intestates, if my said son William Boyle Fitzsimons were then dead, such persons, if more than one, to take as tenants in common in the shares prescribed by the said statutes."

This disposition consists of two parts — 1, the power to appoint, and, 2, the gift in default of appointment. As to the

(1) 37 Ch. Div. 517.

M. R. 1893.

VALENTINE *v.* FITZSIMONS.

first of these, and subject of course to the question whether or not that is a power capable of being now exercised by the present trustees, I think it plain that the class of objects of the power is to be ascertained at the period of distribution, viz. in the events which have happened ten years after the death of the testator, and not at his death. The words used are, "relations by blood *then* living," and "the *then* trustees or trustee."

I have arrived at a very clear opinion that this power cannot be exercised by the present trustees. The "*then*" trustees must mean those who filled that office in November, 1882, no one of whom is a present trustee. In 1882, M'Auliffe, one of the original trustees, was still one, but the only one; and though I think the power might have been then exercised, or even, perhaps, for a reasonable time after, now all the original trustees are gone, and one of the substituted trustees is himself a *cestui que trust*. After more than ten years' delay, and under such circumstances as I have mentioned, there is no authority for holding that a valid appointment could now be made.

Besides, there is the gift over in default of appointment. When does this vest?

But as matter of construction, I think it must be apparent that the class, amongst whom a valid appointment might have been made in 1882, was a class of persons *then living*; and starting with this, we have to consider what is the effect of the clause in default of appointment. "In trust for the persons who would *then* be my next-of-kin, according to the statutes of distribution of the personal estates of intestates, if my son William Boyle Fitzsimons were *then* dead; such persons, if more than one, to take as tenants in common, in the share prescribed by the said statutes."

Now, it is plain that the class to take in default of appointment is a different class than that of the objects of the power. Contrast the words "blood relations" with "next-of-kin," and the reference to the statute of distributions. There was a good reason for the difference. Mr. Jarman states the rule on the subject thus (vol. ii., 4th ed., p. 139):—"Where there is an *express* gift in remainder to next-of-kin, subject to a power of appointment in the legatee for life, the objects of the gift are, of course, to be ascertained without regard to the existence of the power, which,

unless exercised, has no operation on the question. But where such a gift is implied from a power to appoint by will, then the death of the donee is the period to be regarded, whether the power be one of selection or only of distribution."

What is the meaning of the word "*then*" twice used in the latter clause in the will? Apart from authority, there would be hardly a question but that the testator's language referred to the expiration of the period of ten years previously mentioned, and to the class of his next-of-kin to be ascertained as of that date, *i.e.* as if he had died at that time. But contexts such as the present have been so often the subject of decision by the highest tribunals that the matter cannot be treated as wholly at large, and to be dealt with apart from all comparison with the language of other testators as judicially interpreted. The House of Lords, in *Bullock* v. *Downes* (1), now the leading case on the subject, decided on the meaning of a will containing words something like those in the will before me. The Lord Chancellor (Lord Campbell), at p. 12, there says:— "It seems to me quite clear that upon the just construction of this will the personal representatives of the testator's son were, in the events which happened, entitled to a share of the personal property in question; the son, having been one of the blood, or next-of-kin, of the testator, who at the testator's death would, by virtue of the statute of distributions, have been entitled thereto in case the testator had died intestate. Generally speaking, where there is a bequest to one for life, and after his decease to the testator's next-of-kin, the next-of-kin who are to take are the persons who answer that description at the death of the testator, and not those who answer that description at the death of the first taker. Gifts to a class following a bequest of the same property for life vest immediately upon the death of the testator. Nor does it make any difference that the person to whom such previous life interest was given is also a member of the class to take on his death. There is here a bequest to the testator's son Robert for life, and afterwards to his children, and, in case of his having no children, unto such person or persons of the blood or next-of-kin of the testator as would, by virtue of the statute of distributions, have become, and

(1) 9 H. L. Cas. 1.

M. R. 1893.

VALENTINE v. FITZSIMONS.

been, then entitled thereto in case he died intestate. Robert, the son, was one of the class who, as next-of-kin of the testator, would have been entitled at the testator's death to his personalty had he died intestate; and the son having died without having had any children, his personal representatives *primâ facie* are entitled to an equal share with his four surviving sisters, the other individuals of the class." The Lord Chancellor is here referring to the words of the will which were as follows:—"And in case there shall not be any child or children of my son Robert Downes, who, under the trusts aforesaid, should obtain a vested interest in the said trust moneys, &c., and the interest, dividends, and annual produce thereof, in trust for, and to pay, assign, and transfer the same moneys, &c., unto such person or persons of the blood or next-of-kin of the said Andrew Downes as would, by virtue of the statutes of distribution of intestates effects, have become, and been *then* entitled in case I had died intestate."

"There may be" (continues the Lord Chancellor), "as in the last case of *Wharton* v. *Barker* (1), before Vice-Chancellor Page-Wood, a clear indication in the will that, notwithstanding the use of such expressions, the time for ascertaining the class is the time fixed by the will as the period of distribution. But in the will now to be construed, nothing appears to indicate an intention in the testator contrary to the general rule; and, on the contrary, the second "*then*" in this limitation seems expressly to refer to the time of the testator's death as the period when the class was to be ascertained."

Lord Brougham, at p. 17, says:—"I therefore consider that the cases, taken all together, are all one way upon this point, namely, that where, under a will, property is to go to the persons entitled under the statute of distributions, and there is no indication of an intention to exclude the effect of the statute of distributions as to interest as well as persons, that statute must be applied to determine the interest as well as the persons. I hesitate to say that I feel no doubt that they did take the inheritance as tenants in common, but it is sufficient to say that they did not take in joint tenancy." The point which was principally discussed in *Bullock* v.

(1) 4 K. & J. 483.

Downes (1) was whether the next-of-kin took according to the statute as tenants in common, or as *personæ designatæ* as joint tenants.

Lord Cranworth, at p. 18, says:—"Where a testator having by his will made contingent dispositions of his estate, or of any part of it, to take effect after the termination of particular interests for life, has proceeded to direct that if the contingencies do not arise, on which those dispositions are to take effect, then the property shall go to his next-of-kin, according to the statute, the Courts have, in modern times, held that *prima facie* his language is to be taken to refer to those who may happen to answer that description at the determination of the preceding particular interests."

And *Bullock* v. *Downes* (1) was followed by my predecessor in this place, Sir Edward Sullivan, in *Day* v. *Day* (2), the case not of a will, but of a marriage settlement, in which the principle was carried at least as far as in any of the many cases in which it had previously been applied. There the operative words were:—"And for want of such appointment, *then* upon trust immediately after the death of the said Elizabeth M'Carthy, without leaving the said William John Day, her said intended husband, or any child, or children, grandchild or grandchildren, her surviving, to pay the said principal sum, and all interest which may be *then* due thereon, to such person or persons as under the statute of distributions would *then* be entitled to the same as the next-of-kin of the said William John Day, in case the said William John Day shall have died intestate."

At page 391, Sir Edward Sullivan, says:—"The general rule of law applicable to cases like the present can now, as it seems to me, admit of no doubt whatever, viz. that, *prima facie*, the next-of-kin of a deceased party are the persons who answer that description at his death." And after referring to *Bullock* v. *Downes* (1), and *Wharton* v. *Barker* (3), he gives his decision at page 393 in these words:—"I hold, therefore, on the plain language of this instrument, and adopting the admirable rule of construction laid down by Judge Burton (4) in this

(1) 9 H. L. Cas. 1.
(2) Ir. R. 4 Eq. 385.
(3) 4 K. & J. 483. [Br. 645.
(4) See *Warburton* v. *Ivie*, 2 H. &

M. R. 1893. VALENTINE v. FITZSIMONS.

country, and approved of by the House of Lords in *Grey* v. *Pearson* (1), that there is nothing to qualify the ordinary meaning of the words 'next-of-kin,' while there is much to show that they are words intended to be used in their ordinary sense. It further appears to me that the authorities strongly support this view."

But whether this is so, and admitting the strong presumption in favour of the view, that next-of-kin mean next-of-kin at the death of the person specified; that mere words of futurity will not be enough to get rid of this presumption; that the presumption is strengthened by a direct reference to the statute of distributions; and that the duty of the Court is to apply the rule in all cases where it is possible to do so; yet the rule itself is one of mere construction, and if the context exclude it, there is no obligation, I would rather say no power, to apply it.

Now, let us again consider the words with which I have to deal: First, we have the word "then." Everyone knows that the word "then" may be used as equivalent to "*at that time*," or as meaning "*in that case*." Here it is obviously an adverb of time. The phrase is "for the person or persons who would *then* be my next-of-kin"; and not "*then*" in trust for the persons, &c. This must mean, and grammatically can only mean, the persons who at the time when default was made in appointing, or when a partial appointment only was made, *i.e.* ten years from the death. Further, the words are "who *would* then be," not "who *shall* then be": language which points to a class not ascertained by law, but hypothetically capable of ascertainment on an artificial basis. Passing by for the present the intervening words, we find "*if* my said son William Boyle Fitzsimons were *then* dead." Now, no doubt this phrase might account for the use of the conditional "would," as the death of William Boyle Fitzsimons might be the contingency the testator meant as setting up an artificial class. But what is to be done with the word *then* in this place? "If my son William Boyle Fitzsimons were *then* dead." *When?* If

(1) 6 H. L. Cas. 106.

the previous "*then*" means what I think it clearly does (*i.e.* ten years, &c.), this last "*then*" must mean the same thing. But if the previous "*then*" can be got rid of by forcing it, contrary to the grammar and context, to mean "in that case," or the like, such violence cannot possibly be done to it here. Here it must mean "at that time," and nothing else. If so, then, what is that time? It cannot mean the testator's death; for that has not been mentioned at all. It is simply impossible to give it any meaning at all—except that which I have attributed to it. If so, it explains (if indeed to my mind it could be in doubt) what was meant by the previous "*then*," for the testator cannot have meant "the persons who would be my next-of-kin at my death, if my son William Boyle Fitzsimons were dead ten years afterwards;" they must refer to the same time.

But it is said all this must give way, because the testator has referred to the statute of distributions. But how does he refer to it? "Who *would* be my next-of-kin *according* to the statutes."

This is susceptible of meaning "in the way in which kinship is reckoned under these statutes"; what follows, "As tenants in common in the shares prescribed by the said statutes," proves this, and shows that he was anxious to apply the analogy of the statute of distributions in a way to which its words would not strictly apply.

And it is to be observed that he never speaks of a title conferred by the statute—a vital point of distinction, because when a testator speaks of the persons who shall be or would be *entitled* under the statute, it is evident that one class, and one only, can be meant, namely, that which would take immediately on the death. Coming back, then, to the cases on the subject, I am unable to agree with Mr. Twigg's argument, that all the law on the subject prior to *Bullock* v. *Downes* (1) is to be neglected. That case really contains very little on the point in question, as the difficulty which had there to be dealt with was mainly whether the next-of-kin were to take as joint tenants or tenants in common, a question precluded by this will. But in truth *Bullock* v. *Downes* (1) neither decided any new rule, nor purported to over-

(1) 9 H. L. Cas. 1.

M. R. 1893. VALENTINE *v.* FITZSIMONS.

rule any of the cases in the books. On the contrary, the cases are referred to, not in great detail, and are made the basis of decision, somewhat contrary to the inclination of at least some of the learned lords. Amongst others *Wharton* v. *Barker* (1) is referred to with approval.

Now, *Wharton* v. *Barker* (1) was decided just two years before (1858) by Lord Hatherley (then Sir W. Page-Wood), and in his learned and exhaustive judgment all the important cases are fully reviewed, and in citing this case, as I mean to do fully, I shall be relieved from the duty of considering separately the cases to which the Vice-Chancellor refers, and which constitute the entire body of English law on the subject.

The will there was as follows :—The testator devised and bequeathed his real and personal estate upon trust for sale, and after payment of debts and testamentary expenses, to divide the remainder into two equal shares, and to stand possessed of one such share upon trusts for his daughter Mary for life, for her separate use, and after her decease for her children ; and in case she should die without leaving issue, or leaving such, all of them should die under twenty-one without leaving issue, then upon trust for his daughter Sarah for life, for her separate use, and after her decease, for her children ; and as to the remaining share, upon trust for his daughter Sarah for life, for her separate use, and after her decease for her children ; and in case Sarah should die without leaving issue, or leaving such, all of them should die under twenty-one without leaving issue, then upon trusts for Mary and her children, similar to those before declared of the first moiety for Sarah and her children. The will then proceeded as follows :—"And in case my said daughters Mary and Sarah shall both happen to die without lawful issue, or, leaving such, all of them shall die under the age of twenty-one years without leaving any lawful issue, *then* I direct my said trustees, their executors, &c., to pay one equal half part of all the said trust-moneys unto the person or persons that shall *then* be considered as my next-of-kin and personal representative or representatives, agreeable to the order of the statutes of distribution, and the whole of the other equal part

(1) 4 K. & J. 483.

or share unto the person or persons that shall *then* be considered the next-of-kin and personal representative or representatives of my late wife Sarah, whose maiden name was Wharton, agreeable to the order of the statutes of distribution."

There it was argued that the reference to the statutes of distribution pointed to a statutory class, *i.e.* to the next-of-kin at the date of the death of the testator. Lord Hatherley in giving judgment there says :—"The question I have to determine is, who are meant by the testator when he speaks of 'the person or persons who shall then be considered the next-of-kin and personal representative or representatives' of himself and of his late wife respectively 'agreeable to the order of the statutes of distribution.' Upon this question no one attending simply to the terms of the will, and unembarrassed by the decisions pronounced in similar cases, could entertain any doubt. Some of those decisions, however, appeared to render the point obscure, and accordingly I have carefully examined all that were cited in the course of the argument, and many others also, amounting to some thirty or forty in number, but without finding any authority sufficiently strong to justify me in coming to a decision contrary to that which was the manifest intention of this testator. The result of the authorities appears to me to be what I am about to state. In the first place, I find it decided by a continuous stream of authority interrupted a little possibly by some decisions of Sir John Leach, that where there is a limitation by will to one for life, and, after his decease, then to the next-of-kin of the testator, those who are to take under the designation 'next-of-kin' are the persons who answer that description at the death of the testator, and not those who answer that description at the death of the tenant for life; in accordance with the broad principle of construction, by which all gifts to a class, following after a bequest for life in the same property, vest immediately upon the death of the testator, subject only to the superadded rule applicable to certain classes of relations that, although the class is to be so far ascertained at the death of the testator as to comprise all such persons as may then be members, it will open to admit all such new individuals as may be introduced into it during the continuance of the tenancy for life, or other limited interest, and previously to the time fixed for distri-

M. R. 1893.

VALENTINE v. FITZSIMONS.

bution. The vesting takes place immediately on the death of the testator, but, during the interval between that event and the period fixed for distribution, the shares so vested are liable to be divested, as regards the *quantum* of interest, in proportion as new individuals are introduced into the class.

"That being the first rule as to gifts by will to the testator's next-of-kin, preceded by a previous life interest given by the will in the same property, the next rule that I find established by the authorities is, that the mere circumstance that the person to whom such previous life interest is bequeathed by the will is also a member of the class who answered to the description of next-of-kin of the testator at the time of the testator's death, does not prevent the first rule from applying. Where the person to whom such previous life interest is bequeathed by the will is the only individual so answering to that description, the authorities have not been quite so clear as to the construction to be put upon the gift over. But as to the rest, the rules of the Court are clear. Neither the circumstance of there being a previous bequest for life or other limited period, nor the circumstance of the person to whom that previous bequest is made being also one of the next-of-kin of the testator at the time of his death, will prevent the Court from holding that the time at which the class is to be ascertained is the time of the testator's death, and not that fixed by the will as the period for distribution.

"Such being the general rules" (Lord Hatherley thus recognizes the strong *prima facie* presumption) "their application can only be prevented by a clear indication in the will, that, in the particular limitation in question, the testator did not intend them to be applied. For this purpose, the intention must be shown in language clear and unambiguous. Mere words of futurity are insufficient. As to this, some of the authorities have gone very far. A gift 'to one for life,' and afterwards to those who *shall be* my next-of-kin (and not 'who *then shall be* my next-of-kin'), has been held not to be sufficiently clear and unambiguous to prevent the rule from applying, Lord Thurlow saying 'that all dispositions by will are necessarily future.'" Lord Hatherley then refers to *Rayner* v. *Mowbray* (1) the case so decided by Lord Thurlow, and then

(1) 3 Bro. C. C. 234.

continues:—"I will now take a leading case of the opposite description, in which the language of the will was held sufficiently clear for this purpose to prevent the operation of the rule; and it is one which, as it seems to me, must govern my decision upon the language of the will now before me. It is that of *Long* v. *Blackall* (1), before Lord Loughborough, and the decision derives additional importance from the circumstance of its having been approved of by Lord Alvanley in *Holloway* v. *Holloway* (2), which has been looked upon as a leading decision the other way. In *Long* v. *Blackall* (1) the testator bequeathed leasehold property in remainder to trustees, in trust for the child with which his wife was then *enceinte*, in case it should be a son, and after the decease of such son, then in trust for such issue male as at the time of his death should be his heir-at-law; and in case, at the time of the death of such child there should be no such issue male, then the trustees should be possessed of the premises in trust for such persons as should *then* be the legal representatives of him the said testator—words almost identical in effect with those in the will before me, except that I have here the expression 'the persons that shall then *be considered*,' instead of the persons 'that shall then be,' as to which I shall speak presently. Lord Loughborough held that there was no one who could take except the next-of-kin at the time of distribution. He says:—'The testator altered a very sensible part of his will, which is vastly strong, for it proves that he thought upon it, and had some decided meaning' (the will had been altered, having originally stood as the Lord Chancellor goes on to describe):—'His first thoughts were very sensible, to give the absolute interest to his son, in case the entail could not take effect. In making that alteration, which he did with deliberation, not suffering his son to take this remainder after all the particular purposes were exhausted, it is quite impossible he should mean it to vest in his wife, transmissible to those who should become her legal representatives. It would be too much conjecture to apply the words to an heir-at-law, particularly upon leasehold property. There is nobody, I think, who can take it but the next-of-kin at the time of distribution. He certainly meant to keep it

(1) 3 Ves. 486. (2) 5 Ves. 399.

M. R. 1893. VALENTINE v. FITZSIMONS.

in his blood. He could not mean it should be as if he had not disposed of it clearly.' Lord Loughborough's view there is somewhat different from that which I adopt of the case before me. But I agree with what is there said, that when a testator has taken such pains to declare a trust in certain events for persons answering a particular designation, he could not have meant it to go as if he had not made any disposition of it at all. He must have meant it for *some* one besides those to whom the law would have given it in case he had died intestate. That being the view taken of the will in *Long* v. *Blackall* (1) by Lord Loughborough, in *Holloway* v. *Holloway* (2), which has been looked upon as a leading authority in favour of the opposite view, I find Lord Alvanley perfectly concurring in Lord Loughborough's judgment. There the testator bequeathed £5000 in trust for one of his daughters, and after her decease for such children as she should leave at her decease. And in case she should die leaving no child, then, as to £1000, in trust for her executors; and as to the remaining £4000, in these words:—'In trust for such person or persons as shall be my heir or heirs-at-law.' Lord Alvanley held that the £4000 vested in the three daughters of the testator, who were his co-heiresses and next-of-kin at his death. What he says is this:—'The question arises upon a very doubtful clause. Unquestionably, it is competent to a testator, if he thinks fit, to limit any interest to such persons as shall at a particular time named by him sustain a particular character. The only question is, whether, upon the true construction of this codicil, it must necessarily be intended he did not mean by these words what the law *prima facie* would, strictly speaking, intend—heirs-at-law at the time of his death. A testator certainly may by words properly adapted, show, that by such words, *persona designata*, answering a given character at a given time, is intended. But *prima facie* these words must be understood in their legal sense, unless by the context or by express words they plainly appear to be intended otherwise. In this case these words are not necessarily confined to any particular time, nor from the nature of the gift is there any necessary inference that it should not mean what the law

(1) 3 Ves. 486. (2) 5 Ves. 399.

would take it to mean, heirs at the death of the testator.' Then he says, 'It is not like the case of *Long* v. *Blackall* (1). The words there put it out of the power of the Court to put upon it any other interpretation, though it was much contended that it meant at the death of the testator. In that case the word "then" plainly proved that the personal representatives at the time of the death were not intended, and, if that word had not occurred, there was a great deal to show it could not be the intention, and that applies here, for there the wife was his executrix, and it would have been a strange circuitous way of giving it to her.' And again, he says, further on:—'*Long* v. *Blackall* (1) has that very leading distinction from this case, upon the word "then," that there could be no doubt personal representatives at a given time were intended; I must, therefore, hold that if that word had not occurred, the judgment of the Lord Chancellor would not have been such as it was; but, as it is, I perfectly concur in that judgment, together with the argument from the circumstances.' He therefore considers the occurrence of the word 'then' in the will in *Long* v. *Blackall* (1) in the context in which it occurred as the turning point of the decision."

Lord Hatherley then discusses the common law decision of *Doe* v. *Lawson* (2), and at p. 497, proceeds, thus:—"In addition to these cases, which illustrate all that it is necessary to say on the subject, I have also looked through all the more recent decisions upon the point, which seem to me to establish this and no more: that the operation of the rule of construction, which fixes the death of the testator as the time for ascertaining the persons to take under a bequest like the present, is not excluded by the mere circumstance that words of futurity are used, nor by the circumstance that the person to whom the prior life estate is given would be one of the class to take if the persons it comprised were to be ascertained at the death of the testator; but that the application of that rule is excluded, where, after a previous bequest for life or other limited interest, there is a bequest 'to those who *then* shall be' the next-of-kin of the testator, although it would seem, according to Mr. Justice Le Blanc, that in the case last supposed, if the ulterior

(1) 3 Ves. 486. (2) 3 East, 278.

M. R. 1893. VALENTINE v FITZSIMONS.

bequest, instead of being, as there, 'to those who then shall be the next-of-kin,' were to 'those who then shall appear to be his next-of-kin, in such parts and proportions as they would by virtue of the statute of distributions have been entitled to his personal estate if he had died intestate,' the rule would again become applicable, and the death of the testator would be the period for ascertaining the persons to take under that designation."

Then comes an important passage:—"The words with which I have to deal in the case before me are not those put by Mr. Justice Le Blanc. In this will the word 'entitled' does not occur in connexion with the mention made of the statutes of distribution, and the bequest is simply to those who shall then be considered the next-of-kin and personal representative, or representatives, *agreeable to the order* of the statutes of distribution."

These are not exactly the words in the will in this case, but they are substantially the same; in neither will does the word "entitled" occur. Lord Hatherley continues at p. 501:—"In this state of the authorities I find it recognized in all the decisions that if, in a gift to a next-of-kin, without referring to their claiming as under an intestacy, the word 'then' occurs as an adverb of time, referring to the death of the tenant for life, or other event fixed as the period of distribution, that circumstance is conclusive evidence that the testator did not intend the general rule of construction to apply. In the cases before the Master of the Rolls the Court was of opinion, from the context, that it was not so used, and must of necessity be construed to mean 'thereupon,' 'in that event,' so as to mark the conjunction of circumstances; but here I am absolutely precluded from construing the word 'then' in the clause 'unto the person or persons that shall *then* be considered the next-of-kin,' as marking the conjunction of circumstances, by the fact that the same word has previously been used in that sense in the earlier part of the sentence, '*then* I direct that my said trustees, &c.' So that no possible sense can be given to the word when it occurs the second time, unless it be read as an adverb of time."

And at p. 503 he concludes by saying:—"Had the expression been 'who shall then *be*,' instead of 'who shall then *be considered*,' the construction would have been perfectly clear, and I cannot

think the insertion of that doubtful expression sufficient to alter a construction which otherwise is clear and unambiguous."

It was these words, "be considered," that made the difficulty in Lord Hatherley's mind, but in my opinion his reasoning in that case is conclusive of the case before me. It was accordingly declared there that the plaintiffs and the defendants Samuel Wharton and Martha Wood, as the persons who, at the decease of the testator's surviving daughter, were the next-of-kin, according to the statutes of distribution, of the testator's deceased wife Sarah, were entitled to the moiety by the will bequeathed to the last-mentioned next-of-kin.

In my opinion, every word of that luminous judgment applies to the case before me, and I have the greater readiness to follow it that it leads to a conclusion obviously in accord with the meaning of the testator. It is simply inconceivable that any sane man would have used the phraseology on which this question turns if he had meant "then for my next-of-kin as if William Boyle Fitzsimons had died before me."

If *Wharton* v. *Barker* (1) be still law, I think it rules this case. I have shown that it is not only not overruled, but quoted with approval in *Bullock* v. *Downes* (2) and in *Day* v. *Day* (3), by far the strongest case to be found the other way, it is cited as enunciating and illustrating especially well the rule of law applicable to such cases.

Day v. *Day* (3), I have said, is a strong case. Sir Edward Sullivan there felt the pressure of some of the language used in the instrument, and dealt with it in a way more or less satisfactory:—"The middle 'then' is the only one which for a moment can, I think, cause any embarrassment, used as it is apparently as an adverb of time, but undoubtedly inadvertently used in relation to interest due at the death of Elizabeth M'Carthy, for such interest was payable to herself or her personal representative, and not to any of the next-of-kin of William John Day." But he says, "Whatever force may be attributable to the middle 'then' is, I think, overborne by the clear reference to the statute of distributions and the death of W. J. Day intestate; while the

(1) 4 K. & J. 483. (2) 9 H. L. Cas. 1. (3) Ir. R. 4 Eq. 385.

M. R. 1893.

VALENTINE v. FITZSIMONS.

word 'entitled' causes no difficulty whatever, inasmuch as the next-of-kin were in no event entitled to payment of their shares till Elizabeth M'Carthy's death."

With every respect for the opinion of so excellent a Judge, I should have supposed that the word "entitled," so far from creating a difficulty, furnished the main argument in favour of his decision, as appears by the passages I have quoted from Lord Hatherley in *Wharton* v. *Barker* (1), and as to the "middle then," which he disposes of by the ingenious and undoubtedly accurate statement that the sentence must have been inadvertently used, because there could be in fact *no interest* due on principal previously given to a tenant for life, on whose death the gift, whatever it was, took effect, I am not satisfied that the argument is a sound one, when the question is not as to the property which passed by the gift, but as to the time at which the class of takers was to be ascertained. Be this as it may, *Day* v. *Day* (2) is no authority in reference to the present case, on the broad ground that the gift there was to the persons who would *be entitled* under the statute of distributions, a statute which could give no *title* except as of the date of the testator's death, and that in the two cases where the word *then* is used (other than that to which I have referred) it may undoubtedly be read as equivalent to "in that case," and "in that event," whilst in that other instance of its use the Master of the Rolls felt himself able to erase it from the will.

The result is that, in my opinion, the class of next-of-kin here is to be ascertained as of the date of ten years after the death of the testator, and that they will therefore take *per stirpes*.

It is no argument on the construction of the will, but it is worth while to point out that if the opposite contention had prevailed, a curious if not grotesque state of things would have resulted. The moiety of each son was forfeited. As to the share, as I may call it, of George Fitzsimons, it would have gone absolutely to his brother William Boyle Fitzsimons, since at testator's death George had no issue, though he had a daughter, Norah, born before the forfeiture occurred. Thus Norah would have taken nothing under the gift to her father. But William

(1) 4 K. & J. 483 (2) Ir. R. 4 Eq, 385.

Boyle Fitzsimons also forfeited his own share, which in that event would have gone half to George and half to his own children then living, that is the two elder to the exclusion of the third, who was born after the testator. Thus Norah, taking nothing in her own father's share, would have taken half of the share of William Boyle Fitzsimons, *i. e.* one-quarter of the residue, representing her father, while the rest of that share would have gone to two out of three of the children of William Boyle Fitzsimons. But the share of George Fitzsimons, on its forfeiture, would have gone altogether to William Boyle Fitzsimons, and on his death to his personal representatives, and his *then* children would have participated. Such a fantastic distribution is one to which I am glad not to feel myself driven.

I shall declare that the class of next-of-kin of the testator is to be ascertained as to each moiety of the residuary estate as of the date of ten years after his death, date of the 21st November, 1882; that such class consisted of his grandchildren then living; and that they take *per stirpes* and not *per capita*, one moiety belonging to Norah Fitzsimons, and the other moiety in equal shares to the three children of William Boyle Fitzsimons, in the affidavit mentioned.

Solicitor for the trustees: *R. Kelly.*
Solicitor for Norah Fitzsimons: *John Bristow.*
Solicitors for Margaret Fitzsimons and Henry William Fitzsimons: *R. Kelly & Son.*

W. L.

M. R. 1893. Nov. 7, 15.

WILLIAM LLOYD PEIRCE, A MINOR (BY JOHN PRAGNALL PEIRCE, HIS NEXT FRIEND), AND OTHERS, PETITIONERS; ALEXANDER M'NEALE, RESPONDENT.

Appointment—Exercise of power—Will—"Give and bequeath"—Reference to power—Disposition of residue—Estate of deceased—Extrinsic evidence.

A testatrix by her will provided as follows:—"I confirm the gifts to my children" [naming them] "already given to them by deeds of appointment. I will and bequeath that the sum of £200 given my son J. (now deceased) by deed of appointment be paid to my son H. and M., to hold in trust for my grandson E., son of J., which I direct my said executors to pay over to him at the age of twenty-one. I bequeath to my sons F. and R. each the sum of £300, and to G. the sum of £300. I give, bequeath, and devise the residue and remainder of my estate of whatsoever kind, and wheresoever situate, unto my sons W. and E. I hereby appoint my son H. and my daughter M. executors." After the attestation clause of the will, and before the names of the executors, there was the following clause:—"Any just debts and my funeral expenses (which I desire shall be of the simplest kind) I expect my son H. to see to."

At the date of her will the testatrix was entitled for life, under her marriage settlement, to the dividends and interest of a fund, consisting of £2807 14*s.* 6*d.* New Consols, and a small sum of cash, with a power of appointment over that portion of the fund which had not been previously appointed, and which, in default of appointment, was to go to the children living at her death. There had been previously four deeds of appointment, duly executed in favour of four of the children, for a sum of £400 each, subject to the mother's life estate, and there was evidence (though the deed was not forthcoming) that an appointment of a sum of £200 had been made in favour of J., another child, who predeceased the testatrix. There were eleven children of the marriage, one of whom died in infancy. H. and M. were two children in whose favour appointments had been made. All the persons mentioned in the will were children of the testatrix and objects of the power of appointment. At the time of her death testatrix had little or no property of her own on which the will could operate:—

Held, that the will operated as an execution of the power of appointment in all its parts.

MOTION.

By marriage settlement, dated July 1st, 1841, and made on

the marriage of John Pragnall Peirce with Anne Dawson Lloyd, certain properties were vested in trustees upon trust "to pay the yearly rents, interest, and annual proceeds of the same to the said John Pragnall Peirce for his life, or until he should become insolvent, or make any composition with his creditors, and after the determination of the aforesaid trust, then upon trust to pay the said rents, interest, and annual profits to the said Anne Dawson Lloyd for her own sole and separate use for her life; and after the determination of the life interests of the said John Pragnall Peirce and Anne Dawson Lloyd, upon trust to hold all said trust property for all and every, or such one or more exclusively of the other or others, of the child or children, if more than one, or any grandchild or grandchildren, or other issue then in being of the said intended marriage, and for such estate or interest, and in such shares as the said John Pragnall Peirce and Anne Dawson Lloyd, during their joint lives, should by deed or writing, executed in presence of two witnesses, or as the survivor should by deed to be executed in like manner, or by his or her last will and testament, in writing, direct or appoint, and in default of appointment upon trust for the children of said intended marriage, living at the time of the death of the survivor of them, the said John Pragnall Peirce and Anne Dawson Lloyd."

There were eleven children of the marriage, of whom one died in infancy. In 1862 a cause petition was filed in reference to the trust fund, in which a decree was made, and a sum of £2600 was brought into Court, and was on 3rd June, 1869, invested in the purchase of £2807 14*s.* 6*d.* Government Stock, and the dividends were from time to time paid to the person entitled under the settlement. There was also a small sum of cash standing to the credit of the matter, the interest of which was paid in like manner from time to time. Prior to 1872, the eldest daughter of the marriage, Anna Wilhelmina Peirce, was married to a Mr. Brymer, and pursuant to the provisions of the settlement, an appointment of £400 (subject to her mother's life estate therein) was executed in her favour by Mr. and Mrs. Peirce. On the marriage of another child, Mary Victoria Gertrude, to a Mr. Underwood, in 1873, another sum of £400 was jointly

M. R. 1893. PEIRCE *v.* M'NEALE.

appointed by Mr. and Mrs. Peirce in her favour, subject to the mother's life estate therein.

John Pragnall Peirce died in 1881, leaving his wife and all his children surviving, with the exception of Richard, who had died in infancy.

There was evidence that in 1883 Anne Dawson Peirce executed a deed of appointment in favour of one of her sons, John Thomas Cadwallader Peirce, for a sum of £200, and that the deed was sent abroad to him, where he was living, but arrived at his residence after his death. The deed itself was not forthcoming. John Thomas Cadwallader Peirce left a widow and one child surviving him. The widow married again, and the child had not attained age at the hearing of this application. In 1886 Anne Dawson Peirce executed a deed of appointment in favour of her daughter Elizabeth Geraldine, for a sum of £400, to be paid to her after her own (the mother's) decease. By another deed of appointment, dated 18th July, 1888, Anne Dawson Peirce appointed a further sum of £400 in favour of her son Henry, to be paid to him after her own death.

Anne Dawson Peirce made her will in the following terms:— "I confirm the gifts to my children, Wilhelmina Brymer, Mary V. G. Underwood, Elizabeth Geraldine F. S. Peirce, and Henry Peirce, of £400 sterling, already given to them by deeds of appointment. I will and bequeath that the sum of £200 sterling given my son, John T. C. Peirce, by deed of appointment (now deceased), be paid to my son, Henry Peirce, and Mary V. G. Underwood of Somerby Hall, Brigg, Lincolnshire, England, to hold in trust for my grandson, Edward Boyd Peirce, son of John T. C. Peirce deceased, which I direct my said executors to pay over to him at the age of twenty-one years. I bequeath to my sons, Frederick Peirce and Richard Boyd Peirce, each the sum of £300 sterling, and to Gerald Fitzgerald Peirce the sum of £300 sterling. I give, bequeath, and devise the residue and remainder of my estate, of whatever kind and wheresoever situated, unto my sons, William Boyd Peirce and Edward Archibald Peirce. I hereby appoint my son Henry Peirce, of the city of Toronto, in the county of York, gentleman, and my daughter Mary V. G. Underwood, of Somerby Hall, Brigg, Lincolnshire, England, to

be executors of this my will." After the attestation clause, and before the names of the witnesses, there was this clause, "Any just debts and my funeral expenses (which I desire shall be of the simplest kind), I expect my son Henry Peirce to see to."

Anne Dawson Peirce died 14th March, 1893, at Toronto, in Canada. Her son Henry Peirce resided in the same city, and probate of the will was granted to him on the 6th June, 1893, by the Surrogate Court, in the County of York, in the province of Ontario, Canada, reserving the right of the executrix named in the will. A grant of probate of the will was also made in Ireland.

The affidavit of the executor Henry Peirce contained the following statement:—"My said mother was not at the date of the execution of her will or at the date of her death possessed of any property other than the dividends on said trust funds and some small personal effects of little value; and I say that the said fund over which she had a power of appointment amongst her children was the only property upon which the bequests in her said will contained could have any operation."

At the time of the hearing of this application the trust fund was represented by a sum of £56 6*s.* 1*d.* cash, and £2807 14*s.* 6*d.* New Consols, which were standing to the credit of the matter, the dividends and interest thereof having been paid to Anne Dawson Peirce up to January 5th, 1893.

An application was made on behalf of William Lloyd Peirce, and others, for an order that the Accountant-General do make the several payments set out in the schedule, being the amounts appointed by the respective deeds of appointment executed from time to time and the amounts bequeathed by the will of Mrs. A. D. Peirce, as being appointments under the power contained in the settlement of 1841.

W. M. Jellett, in support of the application:—

The only property the testatrix had to dispose of was the trust fund. She knew the facts of the case, and if the will does not operate as an appointment she is making no provision for five of her sons. The power of appointment was present to her mind; she refers to it; she talks of the appointments previously made by

M. R. 1893.

PEIRCE v. M'NEALE.

deeds as "gifts." "Bequeath" means "appoint" in the mind of the testatrix; and the entire will, having regard to the whole of it, is an appointment. There is evidence on the face of the will itself that the testatrix had no property of her own, and if the will is not an appointment it has no effect whatever.

It is not necessary that reference should be made in the will to the power of appointment at all: *Re Morgan* (1). All that is necessary is that an intention may be deduced to do the act, which can only be done by executing the power: *Minchin* v. *Minchin* (2); *Re Williams* (3); *Teape's Trusts* (4); *Gainsford* v. *Dunn* (5); *Attorney-General* v. *Wilkinson* (6).

Herdman's Trusts (7) was a plain case where a pecuniary legacy was given by will. There was no reference to the power at all, or to the subject-matter of the power, nor was there any indication of an intention of the testatrix to execute the power.

Garrett Walker, for William B. Peirce and Edward A. Peirce:—

The will cannot operate as an exercise of the power; for although the testatrix refers to and confirms the appointments previously made, she does not in making the bequests in question in any way refer either to the power or the property its subject-matter, and in speaking of the previous appointments refers to them appropriately by the use of the word "appoint," which she does not use in the operative portion of her will. The appointment of executors is *prima facie* evidence of an intention to deal with property properly speaking belonging to a testator as opposed to "settled" property. But for the fact that the testatrix had little or no property of her own, it never could be contended that the will operated as an exercise of the power and evidence of the state of a testator's property is in the case of personal estate inadmissible for the purpose of ascertaining an intention to execute a power: Farwell on Powers, 2nd Ed. p. 229. This rule is subject only to two exceptions: 1, in the case of a married woman;

(1) 7 Ir. Ch. R. 18.
(2) Ir. R. 5 Eq. 258.
(3) 42 Ch. Div. 93.
(4) L. R. 16 Eq. 442.
(5) L. R. 17 Eq. 405.
(6) L. R. 2 Eq. 816.
(7) 31 L. R. Ir. 87.

2, where the testator refers in his will to some specific description of personal property, in which case evidence may be adduced to show that he had no property of that particular class on which the will could operate. The first exception probably no longer exists: *Herdman's Trusts* (1). [THE MASTER OF THE ROLLS: There was another ground for the decision in that case, namely, that there were two powers, and it was impossible to say which of them the testatrix intended to exercise.] No doubt there was this second ground for the decision; but the inadmissibility of evidence as to the amount of the personal estate of the testatrix was clearly recognized and was a distinct and even the primary ground for the decision. [THE MASTER OF THE ROLLS referred to the words that followed the attestation clause as containing on the face of the will itself some evidence that the testatrix had no property of her own.] These words, though apparently admitted to probate, clearly form no portion of the will, and, in the absence of evidence as to the amount of the property of the testatrix, would not be open to this meaning. We submit that, as Henry Peirce was living with or near the testatrix in Canada and the other executor in England, these words merely point to the fact that of the two executors these duties would naturally devolve upon the former.

Cases like *Teape's Trusts* (2) have no application where the words are sufficiently wide to include property subject to a limited power. The rule as to the exclusion of evidence of the testator's property obtains even in cases where what must obviously be presumed to be the testator's intention would be frustrated: *Jones* v. *Curry* (3); *Jones* v. *Tucker* (4). The case of *Shelford* v. *Acland* (5) was the case of a married woman.

E. Cuming, for E. J. Burke, an assignee of the sum of £400, appointed in favour of Anna Wilhelmina Brymer.

THE MASTER OF THE ROLLS:— Nov. 15.

This case comes before me under the following circumstances:— By marriage settlement, dated 1st July, 1841, and made on the marriage of John Pragnall Peirce with Anne Dawson Lloyd,

(1) 31 L. R. Ir. 87.
(2) L. R. 16 Eq. 412.
(3) 1 Sw. 66.
(4) 2 Mer. 533.
(5) 23 Beav. 10.

M. R. 1893.

PEIRCE v. M'NEALE.

certain properties were put into settlement and the trusts were "to pay the yearly rents, interest, and annual proceeds of the same to the said John Pragnall Peirce for his life or until he should become insolvent or make any composition with his creditors, and after the determination of the aforesaid trust, then upon trust to pay the said rents, interest, and annual profits to the said Anne Dawson Lloyd, for her own sole and separate use for her life, and after the determination of the life interests of the said John Pragnall Peirce and Anne Dawson Lloyd, upon trust to hold all said trust property for all and every or such one or more exclusively of the other or others of the child or children, if more than one, or any grandchild or grandchildren, or other issue then in being of the said intended marriage, and for such estate or interest and in such shares as the said John Pragnall Peirce and Anne Dawson Lloyd, during their joint lives, should by deed or writing, executed in presence of two witnesses, or as the survivor should by deed to be executed in like manner, or by his or her last will and testament in writing direct or appoint, and in default of appointment, upon trust for the children of said intended marriage living at the time of the death of the survivor of them, the said John Pragnall Peirce and Anne Dawson Lloyd." It appears that there were eleven children issue of the marriage, whose names are set out in the affidavit of Mr. Maunsell; and all those who would have been objects of the power have been represented before me. A cause petition was filed in this matter in 1862, in reference to the trust funds which had got into a confused state, and it resulted in a decree, under which a sum of £2600, which represented portion of the trust funds, was brought into Court, and the dividends were from time to time paid out to the persons entitled under the trusts of the settlement. That sum did not represent the whole of the trust funds but the decree directed that all the outstanding moneys should be brought in, and it appears that under that decree one of the trustees of the settlement was committed to prison and ultimately liberated, on an undertaking by his wife (who was possessed of separate estate), to insure her life for a sum of £300, and secure the premiums thereon by a charge on her estate. Apparently, so far as the £300 is concerned, it is not known whether the policy was executed or not, and those interested in the

matter as trustees are unable to give any information, though that policy, if outstanding, might still represent a portion of the settled property.

It appears that the eldest daughter, Anna Wilhelmina Peirce, was married to Mr. Brymer about 1872, and pursuant to the power of appointment contained in the settlement, £400 was appointed in her favour by her father and mother, subject to the life estate of the mother. Another child, Mary Victoria Gertrude married a Mr. Underwood in 1873, and by deed of appointment dated the 20th March, 1876, John Pragnall Peirce and Anne Dawson Peirce jointly appointed to the said Mary Victoria Gertrude Underwood the sum of £400, another portion of the trust fund, to be paid to her in like manner after the death of her mother. John Pragnall Peirce died in 1881, leaving his wife and all his children surviving, with the exception of his son, Richard De Burgh Peirce.

It would appear that in 1883 Anne Dawson Peirce executed a deed of appointment in favour of one of her sons, John Thomas Cadwallader Peirce, of a sum of £200, and that that deed of appointment was sent abroad to where he was living in March, 1883, and arrived there some twenty-four hours after his death. Still if it was executed, it was an appointment of £200 of this reversionary interest in his favour, and was a valid deed of appointment when it left the mother's hands, and that there was such a deed is clear from the terms of her will. By another deed of appointment in 1886, Anne Dawson Peirce appointed £400, another portion of the trust funds, in favour of her daughter Elizabeth Geraldine Frances Sophia, to be paid to her after her mother's decease: and by another deed of appointment she appointed a further sum of £400 in favour of her son Henry Peirce, to be paid to him after her own death. These appointments exhausted £1800 of the trust funds, assuming that the appointment in favour of John Thomas Cadwallader Peirce was executed and was valid.

The mother, Anne Dawson Peirce, died the 14th of March, 1893. She died at Toronto, having made her will, dated 18th July, 1891, in the terms on which the question now arises, because, as I understand it, there is no question as to the validity

M. R. 1893.

PEIRCE v. M'NEALE.

of the appointments of the four sums of £400, but only as to that of the £200 in favour of John Thomas Cadwallader Peirce. The question I have now to determine is whether the will is or is not an execution of the power of appointment of the whole or in part of the residue of the trust funds. Anne Dawson Peirce died in embarrassed circumstances, and it is stated that she was not possessed of any other property, except some small personal effects, and the dividends of the fund in question. Substantially she had no property, unless the property comprised in the settlement could be considered as being hers. The will was made in Canada, and was admitted to probate in the Dominion, and a grant has been made in this country. The will is in these words:—"I confirm the gifts to my children, Anna Wilhelmina Brymer, Mary V. G. Underwood, Elizabeth Geraldine F. S. Peirce, and Henry Peirce of £400 sterling, already given to them by deeds of appointment. I will and bequeath that the sum of £200 sterling given my son John T. C. Peirce, by deed of appointment (now deceased), be paid to my son Henry Peirce and Mary V. G. Underwood, of Somerby Hall, Brigg, Lincolnshire, England, to hold in trust for my grandson Edward Boyd Peirce, son of John T. C. Peirce, deceased, which I direct my said executors to pay over to him at the age of twenty-one years. I bequeath to my sons Frederick Peirce, and Rickard Boyd Peirce, each the sum of £300 sterling, and to Gerald Fitz Gerald Peirce the sum of £300 sterling. I give, bequeath, and devise the residue and remainder of my estate of whatever kind, and wheresoever situated, unto my sons William Boyd Peirce and Edward Archibald Peirce. I hereby appoint my son Henry Peirce, of the city of Toronto, in the county of York, gentleman, and my daughter Mary V. G. Underwood, of Somerby Hall, Brigg, Lincolnshire, England, to be executors of this my will." And then follows the attestation clause, with a paragraph or sentence in it not properly in the nature of an attestation, but which appears to have been, so far as I can see, admitted to probate, or put upon the probate, in Canada, and also in this country, whatever the effect is. The attestation clause proper is this, "signed and declared by the above-named Anna Dawson Peirce in her presence by us both at her request, and we hereunto subscribe our names as witnesses." And then before the names of

the witnesses comes this clause, "any just debts, and my funeral expenses (which I desire shall be of the simplest kind), I expect my son Henry Peirce to see to." Then come the names of the witnesses with their addresses, and at the side, or in the margin, is the name "Anna D. Peirce," and that is the whole of the will.

The question now is whether these gifts of £300 each, and the gift of the residue, or whether any of them is an execution of the power of appointment, or whether they are to be left to take effect, on whatever property of her own the testatrix may have left.

Cases of this sort very often arise, and the general rule of law in reference to the construction of such documents is laid down by Mr. Farwell in his excellent treatise on "Powers," at p. 176. "The instrument," that is in order to be an execution of a power of appointment, "must refer either to the power or to the property subject to the power, or it must affect to deal with some property in general terms, not defining it, under such circumstances that it cannot have effect except upon the property comprised in the power," and he cites a great number of cases where this rule will be found stated in varying terms by a number of eminent judges.

The present case is not one in which the property, subject to the power, is specifically referred to. It remains to consider whether it falls within the other heads of the rule.

The first thing that strikes one about this peculiar will, in relation to the question now to be decided, is that it appoints executors, a circumstance pointing in some degree towards the view that the testatrix supposed that she was dealing with property of her own. Such an inference is, however, never coercive in these cases, though it is a matter to be weighed, together with the other circumstances of the case (see *Churchill* v. *Dibben* (1) *in notis*), and in the present case its significance is reduced to a minimum by the fact that the only duty sought to be imposed upon the executors, as such, by direct words, is a duty plainly and manifestly connected with the power and not with property. The testatrix thought that an executor was needed to carry out her intention to appoint under the power. She directs her executors

(1) 9 Sim. 447.

M. R. 1893. PEIRCE v. M'NEALE.

to pay over to Edward Boyd Peirce, at 21, the £200 which she had appointed to his father. Obviously the appointment of executors is, therefore, *in this will*, a neutral fact, consistent alike with an intention to appoint and with an intention to dispose by virtue of interest.

Again, a circumstance often noticed in the cases where it occurs is, that the testator purports to charge debts and legacies. When this is the case, there is always an argument that he intends to deal with his own property and not with that over which he has merely a limited power of appointment. Yet even this is not conclusive when it occurs, as in *Harvey* v. *Stracey* (1), at p. 113, where the learned Judge says :—"Now, it has been held repeatedly that if there is a reference to the power, and the will purports to be made in pursuance of the power, it is not necessary to describe the property, but the expression 'my personal estate' is sufficient," and a similar point will be found discussed in *Ferrier* v. *Jay* (2); *Cowx* v. *Foster* (3); *Re Teape* (4); *Thornton* v. *Thornton* (5); *Re Swinburne* (6).

But in the will before me there is no such clause. Nay more, there is a very remarkable omission of any such clause—an omission which, under the circumstances, satisfies me that the testatrix intentionally refrained from inserting it, because she had the question of debts and funeral expenses present to her mind. After the attestation clause the words to which I have already adverted occur. No doubt the attestation clause is not part of the will; but these words were written before the signatures of the witnesses, and very likely before the name of the testatrix, and they have been included in the probate. Even if not part of the will, and I am inclined to think they are, they are a contemporaneous statement of the testatrix, and may throw light on the omission of such a direction in the context. It will be observed that it is not the executors who are directed, or requested, or expected to do anything. It is "my son Henry." No doubt Henry was an executor, and the one living nearest the testatrix. But in this place he is not called executor, nor directed to do anything as such. Again, she does

(1) 1 Drew. at p. 113.
(2) L. R. 10 Eq. 550.
(3) 1 J. & H. 30.
(4) L. R. 16 Eq. 442.
(5) L. R. 20 Eq. 599.
(6) 27 Ch. Div. 696.

not say, in the ordinary way, "I direct my executor to pay any just debts and my funeral expenses," but "I expect." Occurring where it does, and worded thus, I read this clause as the expression of a request that Henry would "see to" the payments in question, not as matter of legal obligation, save in so far as she might leave any assets available for the purpose, but as a compliance with the requirements of filial duty and affection. Very likely she lived with Henry. At any rate they both resided in Toronto. He was, it is plain, a favoured and trusted son. I can only explain this clause, coupled with the want of any similar words in the prior part of the will, as indicating that whatever property she was disposing of in the will she did not look upon in the main as being her own.

We have, therefore, a will which, while it does appoint executors, does so in a way not indicating any intention to deal with the property as testatrix's own, and one which certainly does not in terms charge debts and funeral expenses on the property dealt with.

The will, too, and this is the most important point of all, does refer to, and recognize, and purport to exercise, the power of appointment. This is so, not merely in the dealing with the £200 in favour of the son of John Cadwallader Peirce, but also in reference to the four sums of £400 each; for the confirmation of an appointment can only be intended to be itself an appointment, to operate in the event of prior exercises of the power being in any way bad or defective. Further, she speaks of the interests under the power as "*gifts*" . . . "*given* to them by deeds of appointment," showing that she regarded the substance of the matter as her own bounty, and the appointment only a means of conferring a gift. True it is that in reference to the three sums of £300 each in favour of Frederick, Rickard, and Gerald, she uses the word "bequeath," a word more apt in describing a legacy than an appointment. But if, instead, the word "give" had been used, the legal import would not have been different; and it would exactly have corresponded with her own description of the undoubted appointments; and in numbers of cases similar language has been held not to prevent a will from operating as the exercise of a power. It occurs in nearly all the cases where

M. R. 1893. PEIRCE v. M'NEALE.

the question has arisen as between appointment and legacy. No doubt, standing by themselves, the dispositions of these last-mentioned sums would be legacies, as in *Webb* v. *Honnor* (1), *Mattingley's Trusts* (2), and numerous other cases, and as I recently held in *Herdman's Trusts* (3). But they do not stand alone. They occur in a will which refers to and purports to exercise a power, and the language is not very dissimilar from that which is used in reference to the power itself.

The gift of the residue is, "of my estate of whatever kind and wheresoever situated." She calls it "my estate." But these words do not negative the idea of power any more than does the word "gift" or "bequeath"; and that was made the subject of comment in *Harvey* v. *Stracey* (4). The learned Judge there says (p. 115):—"However, it would be useless for me to go through the cases; it is sufficient to say that the principle is well established; that it is a question of intention, and there must be a reference either to the power or to the property; and it would be a loss of time to compare the language of the different instruments on which the decided cases have turned."

This residue was what remained after something was taken out. I think it must, at any rate, include all that remained after taking out what the executors were to deal with. But the executors were to pay £200, confessedly money under the settlement; and on the whole frame of the will, I think that before the residue is to be ascertained the testatrix meant that everything that the will purported to deal with must be deducted. If this be so there would be some analogy to the principle recognized by the House of Lords in *Greville* v. *Browne* (5). Considering, too, that this will refers to and purports to exercise the power, in part at all events: that all the beneficiaries under it are objects (and they are *the* objects) of the power: that no possible reason can be assigned why the testatrix should have intentionally left unappointed a large part of the fund under the settlement whilst dealing with the rest: that the residue is constituted in such a way as in reality to refer to the power; and that if it were an ex-

(1) 1 J. & W. 352.
(2) 2 J. & H. 426.
(3) 31 L. R. Ir. 87.
(4) 1 Drew. 73.
(5) 7 H. L. Cas. 689.

ercise of the power it would fit in with it in every possible way, I have no doubt, apart from the question as to what other property the testatrix may have had, that the power is executed and exhausted by this will.

Workman v. *Petgrave* (1) was a case which arose under somewhat similar circumstances to the present. In that case a testator had under a settlement a power of appointment over two different denominations of freehold, and also a power of appointment over shares in a colliery; and besides these shares he also had an interest in the same colliery vested in himself beneficially. The question was whether words in his will dealing with the colliery shares were an execution of the power of appointment or whether they must operate on the interest which he had beneficially leaving unappointed the shares in the colliery over which he had the power of appointment. The learned Judge says:—"It is admitted that the testator had no property at *Belluton*" that is one of the freeholds—"other than that over which he had the power of appointment, and that, therefore, unless he is to be taken to have exercised the power (although he has made no reference to it in any part of his will), the devise of his estate at *Belluton* must fail. It is plain, according to the settled rule of this Court, that under these circumstances the testator must be taken to have exercised the power of appointment as regards the *Belluton* estate. I must therefore read this gift as indicating, as plainly as anything can indicate, that, at the time when he made his will, he intended to exercise the power of appointment given to him by the settlement. The same observation applies to the devise of the *Sideham* estate. Stopping there for one moment, I am obliged to come to the conclusion that at the time when the testator made his will he did intend to exercise the power, and that he has well exercised it as regards two of the properties subject to it." On that point the present case is an *a fortiori* one. "The third property subject to the power was the quarter share in the *Braysdown Colliery*. Between the gift of the *Sideham* property and that of the *Braysdown Colliery* shares he devised some property, which he states he had recently purchased. Then he makes a gift in these terms, 'I give

(1) 30 Ch. Div. 617.

M. R. 1893. PEIRCE v. M'NEALE.

and bequeath all my shares and interest in the *Braysdown, Huish, Writhlington Colliery Companies* unto and equally between my three daughters (naming them), as tenants in common, share and share alike.' The question is whether under that gift the settled quarter-share in the *Braysdown Colliery* passed, or only those shares which belonged to the testator absolutely? It is said that the only reason why the *Belluton* and *Sideham* properties passed by the will is that there was no other property of the testator to satisfy the gifts contained in the will. Had there been other property to satisfy those devises, then, as there is no reference whatever in the will to the power of appointment, and the property is described as belonging to the testator, only such property as belonged to him absolutely would have passed. But, inasmuch as there was no other property to satisfy those devises, and it is admitted that therefore the *Belluton* and *Sideham* properties did pass, it follows, as a matter of course, that the testator must be considered as having intended to exercise the power of appointment. Therefore, in construing the gift of the shares in the *Braysdown Colliery*, I am dealing with a will by which the testator was intending to exercise the power of appointment given to him by the settlement, and by which, as regards two of the properties subject to the power, he has, beyond all dispute, exercised it. When, therefore, I come to the third property, which is given in precisely the same terms as the two properties which are admitted to have passed under the will, how can I possibly say that the testator did not intend to exercise the power with regard to that property also, and to appoint those shares which he had the power to appoint? If any authority had been produced showing that, when a power has been twice exercised in a will, I must, in the case of a third gift, read the will just as I should if that were the only gift in it, and I had to determine whether the power had been exercised, I might have felt myself bound to follow that authority. But in the absence of any such authority, I think that when you find the testator intended to exercise the power, and did exercise it with regard to two properties subject to it, you ought in the case of a third gift, which may also comprise property subject to the power, to consider that the testator intended to exercise the power, and that he has exercised it," and he so decided. That was a very

much stronger case against the intention to exercise the power than the present, because there there was no distinct reference to the power at all.

I do not think it needful to discuss the great number of cases in which somewhat similar questions have arisen and have met with varying treatment from time to time. Here you have a clear reference to the power. Cases in which there is no such reference, but a more or less vague or insufficient description of the property subject to it, and where the question is how far loose words of description can be stretched or narrowed so as to include or exclude particular portions of the settled property, have really no bearing on the present. *Hughes* v. *Turner* (1) is a case of that description, where Pepys, M.R. (afterwards Lord Cottenham), reversing on a re-hearing a previous decision of Sir John Leach, held that the power was not executed to the extent alleged; and there are many others resulting in decisions *pro* and *con*, according to the circumstances of each case. Here the question is not as to the designation of the property acted on, but as to the extent to which an undoubted reference to the power is to be carried. I think it permeates the entire will.

In the present case there is another circumstance, not to be found in those last referred to: that the testatrix had hardly any, if any, property of her own on which her will could act. I am called upon to shut my eyes to this fact, and to hold that Mrs. Peirce in giving £900 and a residue must, as matter of law, be held to have meant that that was to be paid out of her own assets, which were *nil*, and to have intended to leave undisposed of the £900 and a residue, which she had the right to give to the very same persons under the power which her will refers to and exercises, in part at all events. It is not the case of a will silent as to the power, and containing no reference to the property subject to it, as in *Herdman's Trusts* (2), and other cases.

There is much to be said for the view that in this, as in other cases, the testatrix's circumstances as to property may and must be inquired into to some extent. Without some extrinsic evidence the question can hardly arise; and if there is any class of cases in

(1) 3 M. & K. 666. (2) 31 L. R. Ir. 87.

M. R. 1893.

PEIRCE v. M'NEALE.

which it is legitimate for the Court to receive evidence as to the testator's property, and the property subject to the power, it is especially a case such as this. If a man says in his will, "I give A B £100," and says nothing else, that will not amount to the exercise of the power to appoint, whether he has or has not £100 of his own. It wants every ingredient of an appointment. It does not refer to the power, nor does it purport to deal with property which can pass only under it. But that is not the case here. You cannot construe the will by the property, but very often you cannot construe the will without knowing what the property is.

That the Court may look at the surrounding circumstances of the testator in many cases follows from the decision, after an elaborate discussion of the authorities, by Lord Truro, affirming the decision on this point of Sir L. Shadwell, V.-C. in *Innes* v. *Sayer* (1). At p. 614, he says:—"It was argued that evidence of the state of the property at the date of the will is inadmissible in this case, and Sir James Wigram's work" (that is his work on the "Application of Extrinsic Evidence to Interpretation of Wills") "was quoted in support of this view; but the very contrary is maintained in that work (p. 51, 3rd ed.). 'For the purpose of determining the . . . subject of disposition a Court may inquire into every material fact relating to the . . . property which is claimed as the subject of disposition, and into the circumstances of the testator and of his family and affairs, for the purpose of enabling the Court to identify the thing intended by the testator.'" He then goes into an elaborate discussion on the cases bearing on that proposition.

That was no doubt the case of a specific gift and in terms applies to such cases only. But Mr. Jellett argued that the principle goes further. No doubt the fact that a testator had no property of his own, adequate to provide for a legacy, *Nannock* v. *Horton* (2), and that he had a power of appointment over property which would validate the disposition as an exercise of the power, is not enough, *Andrews* v. *Emmot* (3), if neither the power nor the property subject to it is referred to.

Though the Court may, and indeed must, see the intention of

(1) 3 M. & G. 606. (2) 7 Ves. 391. (3) 2 Br. C. C. 297, Thurlow, C.

the testator as to his property and the property under the power before deciding such questions, it cannot have recourse to the facts in order to convert words merely importing a legacy into the exercise of a power. But it can and must read the whole context of the will; and on the whole, and assuming that the rule of law precludes the Court from doing what any business man, not so trammeled, would be held insane for not doing; giving in this case the fullest effect to what I think a somewhat narrow if not pedantic contrivance for defeating the intention which the law professes to regard as supreme; and treating the question as one depending on the will itself alone, I am of opinion that this will is a good execution of the power in all its parts.

Solicitors for the applicants, and for William B. and Edward A. Peirce: *Maunsell & Son.*

Solicitor for E. J. Burke: *John Noble.*

R. W. L.

IN RE CRAMSIE AND GREER.

Practice—Taxation of costs—Solicitor—Attendances in Dublin—Board of guardians.

Upon a summons by a solicitor for an order directing the Taxing Master to review his taxation of a bill of costs as between solicitor and client:—

***Held*, that the special fees and expenses of a country solicitor should be allowed in respect of attendances for consultation with counsel, and otherwise for the purpose of conducting proceedings in Dublin, when the solicitor having local knowledge in connexion with the matter had been requested by his clients (a board of guardians) to attend personally in Dublin.**

MESSRS. CRAMSIE & GREER, a firm of solicitors practising in Ballymoney, acted as solicitors for the Ballmoney Board of Guardians, in respect of an application to build cottages under the Labourers' Acts. This application was opposed by the owner of the land proposed to be taken at the Local Government Inquiry, and before the Privy Council, to which an appeal was taken.

Previous to the hearing before the Privy Council, the following

M. R. 1893. *In re* CRAMSIE AND GREER.

resolution was passed by the Ballymoney Board of Guardians:—"That Mr. Greer be asked to go to Dublin to represent the Board of Guardians at the consultation and hearing of the appeal against the Ballymoney Union Labourers' Order, 1892, and that he be authorized to take such witnesses as may seem necessary to him." Mr. Greer attended the consultation with counsel in Dublin, and at the hearing, and adjourned hearing, before the Privy Council, being engaged in reference thereto in all five days. The fees claimed in respect of such attendances were £15 15*s.*, and £8 8*s.* for expenses. The Taxing Master allowed £5 5*s.* as fees to Mr. Greer for his attendances, and disallowed the whole sum of £8 8*s.* for expenses. In his report he stated:—"I disallowed the special fees for the solicitor, on the ground that he was bound to attend Dublin business of his clients as a registered Dublin solicitor at the usual charges."

An affidavit had been filed, stating that Mr. Greer was possessed of local knowledge in the matter, and Mr. Gordon, Q.C., the senior counsel in the case, had certified that Mr. Greer's personal attendance, both at consultation and at the hearing before the Privy Council, was absolutely necessary.

An application was now made by Messrs. Cramsie & Greer for an order to review the taxation of the Taxing Master as to the disallowance of the items of £10 10*s.*, fees for attendances, and £8 8*s.* for expenses, and that he might be directed to allow the full amount claimed in respect of such attendances and expenses.

Gordon, Q.C., in support of the application:—

This was an exceptional case, in reference to which Mr. Greer possessed local knowledge, which rendered his attendance in Dublin necessary. His attendance was expressly authorized by resolution of the Board of Guardians. The duties could not have been discharged by the town agent, and where, in a special case, the country solicitor is requested by his clients to attend in Dublin, he is entitled to special fees: *In re Storer* (1).

(1) 26 Ch. Div. 189.

THE MASTER OF THE ROLLS:—

In this case the guardians passed a resolution directing Mr. Greer to attend in Dublin for, amongst other purposes, consultation. The business to which he was requested to attend was not that which falls within the routine of a solicitor's practice. If it were such, it might very well be left to the town agent. If a solicitor does anything in the course of ordinary litigation, he should as a rule be dealt with on the principle that he is supposed to be in Dublin attending to business at any time it may require his attendance. But that is not the case here. In this application the duties were of a kind which a town agent would be wholly incompetent to discharge. Mr. Greer appears, from what has been stated, to have local knowledge in the matter, and I should have so inferred, even if it had not been stated in the affidavit. Mr. Gordon, who was counsel in the matter, has certified that Mr. Greer's attendance was essential to the case. The question is whether he is entitled to his fees and expenses for having attended on consultation and afterwards on the hearing before the Privy Council in accordance with the resolution of the guardians. Was Mr. Greer to disregard that resolution; or, if he attended in pursuance of it, was he to do so at his own expense? I do not find that the Taxing Master has objected to the items on account of the amount. The charges are, in the first instance, five days' attendance at consultation, and at the hearing of the appeal in Dublin, eight guineas for expenses. I do not see any reason to suppose that that is exorbitant; nor has the Taxing Master objected to it on that ground. I differ from him in the view he has taken about the duties; and while I think he is quite right in looking closely into these costs incurred by boards of guardians, which are not paid by the guardians personally, but out of the pockets of the ratepayers, I think that under the circumstances the disallowance of these items was, perhaps, an exercise of excessive caution on the part of the Taxing Master.

Solicitors: *Cramsie & Greer.*

R. W. L.

M. R.
1893.
June 7, 13.

COYNE *v.* DUIGAN.

(In re Duigan, Deceased.)

(1888. No. 10,671.)

Settlement—Construction—Provision "in lieu of dower and thirds at common law or otherwise"—Statute of distributions—Widow's share under, whether barred.

By marriage settlement, lands of the husband held for lease for lives renewable for ever, and lands of the wife held for a term of years, were settled upon trust, after the death of the husband, that the wife, in case she should survive him, should receive and take during her life for jointure in lieu, bar, and satisfaction of, all dower and thirds, to which she might at common law, or otherwise, be entitled, the annual sum of £50 charged upon all the said lands.

The settlor died intestate as to portion of his personal estate, leaving his widow and two children surviving.

Held, that the widow was barred from any share of the undisposed of personal estate.

In re Burgess' Trusts (11 Ir. Ch. R. 164) followed.

Hearing on further consideration.

This was an action to administer the personal estate of William Duigan, and to have the trusts of his marriage settlement carried into execution, and the rights of the parties declared thereunder. The plaintiff Mary Coyne was the widow of J. L. Coyne, and the only daughter of William Duigan. The defendants were Michael Duigan, the only son of William Duigan, and Elizabeth Duigan, widow of William Duigan, a person of unsound mind.

By the settlement, executed on the marriage of William and Elizabeth Duigan, William Duigan conveyed certain lands in the Queen's County, held under lease for lives renewable for ever, and Elizabeth Duigan conveyed certain lands and tenements in the city of Dublin, held under a lease for years, and also all other property to which she might become entitled, to a trustee, upon trust to permit the husband to receive the rents and profits

of the trust property during his life or till bankruptcy, and after his bankruptcy upon trust to pay the same to the wife for the remainder of the husband's life, and after his death "upon trust that the said Elizabeth Duigan, in case she should survive the said William Duigan, should receive and take during her life, for her jointure, in lieu bar and satisfaction of all dower and thirds to which she might, at common law or otherwise, be entitled, the annual sum or yearly rent of £50 to be charge upon and yearly issuing and payable out of all and singular the said lands, tenements, and hereditaments, and to be paid to her or her assigns on every 1st day of May and 1st day of November in each year." Then followed a power of distress and entry; and, subject to the jointure, the trust property was to be held in trust for the issue of the marriage, as the husband and wife, or the survivor, should appoint, and in default of such appointment, for the children in equal shares.

William Duigan died on the 3rd May, 1888, leaving the defendant Elizabeth Duigan, his widow, and two children, the plaintiff Mary Coyne, otherwise Duigan, and the defendant Michael Duigan, him surviving. William Duigan made a will, dated the 13th February, 1879, the terms of which are not material to the question in the case, and letters of administration with the will annexed were granted to the defendant Michael Duigan. The testator died possessed of considerable personal estate, more than half of which was undisposed of by his will.

The trustee of the settlement predeceased the testator, and no new trustee had been appointed. The defendant Michael Duigan, after the death of the testator, paid the jointure of £50 for the maintenance of his mother, the defendant Elizabeth Duigan, who had become of unsound mind.

The defendant Michael Duigan, in his statement of defence, contended that his mother, the defendant Elizabeth Duigan, was, by reason of the provision for her in the settlement, not entitled to a third of the testator's undisposed of personalty. No defence was put in on behalf of the defendant Elizabeth Duigan. At the hearing the ordinary decree for administration was made, and this question raised by the defendant Michael Duigan was reserved for the further consideration.

M. R. 1893.

COYNE v. DUIGAN.

R. E. Meredith, Q.C., and *Oulton*, for the plaintiff :—

The widow is barred by the clause in the settlement. The word "thirds" is not confined to real estate: *Thompson* v. *Watts* (1).

Alexander F. Blood, for the defendant Elizabeth Duigan :—

The widow is not barred: *Colleton* v. *Garth* (2), which is approved in *Thompson* v. *Watts* (1). There is no magic in the words "or otherwise."

Price, Q.C., and *W. M. Jellett*, for the defendant Michael Duigan :—

Colleton v. *Garth* (2) is distinguishable: see the judgment of Lord Hatherley in *Thompson* v. *Watts* (1), where he discusses *Colleton* v. *Garth* (2). The words "or otherwise" did not occur there. The £50 in the present case is charged on the personalty put in settlement by the wife, as well as on the realty of the husband. [They cited *Gurly* v. *Gurly* (3) and *Sambourne* v. *Barry* (4).]

Oulton, in reply.

June 13.

THE MASTER OF THE ROLLS :—

[The Master of the Rolls having stated the facts of the case, and how the question to be determined came before him, proceeded as follows :—]

The words are "upon trust that the said Elizabeth Knaggs, in case she survives the said William Duigan, and her appointees, executors, administrators, and assigns, shall and may, from and after his decease, receive and take during her life for her jointure, and in lieu bar and satisfaction of all dower and thirds to which she might at common law or otherwise be entitled, the annual sum or yearly rent of £50, to be charged upon and yearly issuing and payable out of all and singular the said lands, tenements, and hereditaments."

The words "dower and thirds" are sometimes loosely used; in

(1) 2 J. & H. 291.
(2) 6 Sim. 19.
(3) 8 Cl. & Fin. 743.
(4) Ir. Rep. 6 Eq. 28.

fact the latter word has not any fixed meaning. It sometimes means the wife's provision out of real estate, and is thus synonymous with dower, and sometimes it means the provision for her out of personalty, in which case it means her share under the statute of distributions in case of intestacy, although that share may be a half and not a third. Usually, however, the words in conjunction, if the context admits of that contention, include both dower and distributive share, particularly when, as in *Thompson* v. *Watts* (1), the provision substituted for dower and thirds issues out of both real and personal estate.

Lord Hatherley, at p. 303, there says:—"Upon the whole, therefore, the conclusion at which I arrive from the authorities is, that the word "thirds" is a general expression, which may signify, according to the interest and scope of the instrument, the interest of a widow in any property, whether personal or real, of her deceased husband in case of his intestacy." But the fund out of which the provision is to issue is only one element in considering the question and there is no reason why an ante-nuptial agreement to accept personal property in lieu of dower, or an interest in lands in lieu of a distributive share of personal estate, should not be perfectly valid if properly expressed. That is a question of intention.

In *Colleton* v. *Garth* (2) the provision was a rentcharge, and it was stated to be "for her jointure, and in lieu of dower and thirds at common law." The question was, whether the widow was excluded from her distributive share of the undisposed of residue of the testator's personal estate. Shadwell, V.-C., says:—"It is clear that the rentcharge was intended to be in lieu only of any claim which the wife might have upon her husband's lands"; and he accordingly made a declaration that the widow was not barred of her distributive share of the undisposed of residue of the testator's personal estate.

As a jointure in strictness means a provision out of the husband's lands, an inference from that fact was probably drawn in *Colleton* v. *Garth* (2), in support of the view which the Vice-Chancellor adopted. But it is well settled that there may be a perfectly good

(1) 2 J. & H. 291. (2) 6 Sim. 19.

M. R. 1893. COYNE v. DUIGAN.

equitable jointure, which will bar dower, though not issuing out of, or in any way concerned with, land: *Dyke* v. *Rendell* (1); and the word is rarely used with such strictness as to confine it to provisions possessing the six requisites enumerated by Coke (Co. Litt. 36*b*). In *Sambourne* v. *Barry* (2) no stress was laid on the use of the word "jointure." That was a peculiar case. There real and personal estate of the husband, as well as personal estate of the wife, were put in settlement, and the wife was secured an annuity, which was "to be in full for her jointure, and in lieu bar and satisfaction of and for her dower and thirds at common law, which she can, shall, or may, or otherwise might have, or claim of, in, or out of all and every the said lands, tenements, hereditaments, and premises, stocks, funds, and securities, whereof or whereunto the said W. N. Barry, at any time during the said intended coverture, shall be seised or entitled for any estate of inheritance to which dower or thirds is incident."

The Master of the Rolls there decided that the lady was barred from her dower and distributive share of her husband's property and her own fortune, which was the subject of the settlement, but that she was entitled to dower and a distributive share in respect of any property not comprised in it. He adopts Lord Hatherley's view in *Thompson* v. *Watts* (3) of the meaning of the word "thirds," which I have already quoted, and adds that he was not embarrassed by the use of the words "at common law." "But those words" (he says) "are found in this clause, which is a stronger clause than many of those clauses to be found in settlements where the widow's distributive share of personalty was decided to be barred. I think it plain that it was intended that Mrs. Barry should be barred as well of dower as of thirds in all the real and personal estate comprised in the deed."

But the words "at common law" are strictly applicable to dower and not to a share under the statutes, though indeed it would not be safe to rely on that distinction as conclusive: see *Gurly* v. *Gurly* (4). In that case it was declared by the settlement that the provision made for the intended wife, which was the income of a sum of £800, her property, together with a

(1) 2 De G. M. & G. 209.
(2) Ir. R. 6 Eq. 28.
(3) 2 J. & H. 300.
(4) 8 Cl. & F. 743

further life estate thereby provided for her out of certain rents, should be paid to her as and for her jointure in full lieu bar and satisfaction of any dower or thirds which she could, or might, claim at common law, out of all or any of the estates, real, personal, or freehold, of which the said B. Gurly now is, or at any time or times hereafter shall become possessed of or entitled to." The House of Lords, affirming the decision of the Lord Chancellor of Ireland, held that the claim of the widow on the personal estate of her intestate husband, under the statute of distributions, was barred by the settlement. The Lord Chancellor (Lord Lyndhurst), after reading the clause in the settlement, says:—"It appears to me that by these expressions it was intended that the wife should, in respect of the sum thus secured to her, discharge from all claim of hers every part of the estate of her husband, and that the sum and property so settled should be taken in lieu of such claim." He then refers to *Druce* v. *Denison* (1), and says that the only distinction that could be set up arose from the insertion of the words "at common law." "But the words 'common law'" (he continues) "cannot be interpreted in this passage in their strict sense, and as contradistinguished from statute law, because in that case they would be altogether insensible. The words 'common law' in this passage must therefore be construed as equivalent to the terms 'according to the general law,' according to law as distinguished in ordinary parlance from equity; and unless we put this construction on the clause, the word 'personal,' which is contained in it, would have no effect or meaning whatever. I am therefore of opinion that this settlement was meant to bar the intended wife of all claims which she might set up against the real or personal estate of the gentleman whom she was about to marry."

In the present case, as in *Colleton* v. *Garth* (2), the provision is described as a "jointure," and it issues, so far as the property of the husband is concerned, only out of his lands. But the present case differs from *Colleton* v. *Garth* (2), in that the words "or otherwise" are added.

The words in *Colleton* v. *Garth* (2) were confined to dower and thirds at common law. "At common law or otherwise"

(1) 6 Ves. 385. (2) 6 Sim. 19.

M. R. 1893. COYNE v. DUIGAN.

must include every conceivable title: and *Druce* v *Denison* (1) has some bearing on the present case, though there there was no doubt an express mention of personal estate. There it was contended by the next-of-kin that the widow was excluded upon the words of the settlement, by which she agreed to accept and take the provision thereby agreed to be made for her in lieu bar and satisfaction of all dower or thirds which she might otherwise be entitled unto out of all the real and personal estate of the testator. The provision there was £160 a-year, covenanted to be secured out of such other real and personal estate as he should be possessed of, in the place of which the will substituted an interest in £11,000 stock for her life. It was contended on behalf of the widow that that provision was made with a view to children, to bar her claim upon the personal estate in the case of an intestacy, there being children, for a third of the personal estate was not the portion to which she was entitled in the event which had happened, there being no children. Lord Eldon there says, at p. 394:—"As to the word 'thirds' the clear intention must be taken to mean her interest in case of intestacy. If that word did not occur, I doubt whether the personal estate would not have been included under the word 'dower.' The word 'thirds' is never used accurately. It is a sort of expression, in common parlance, descriptive of the interest upon an intestacy. The plaintiff's argument is too ingenious upon the construction of a settlement, and cannot apply when that word is connected with 'dower,' which would apply to both events, whether there are children or not."

But I find that in a case of *Burgess' Trusts* (2), which was decided two years before *Thompson* v. *Watts* (3), the words were in this respect identical with those before me. The question which arose there was, whether the petitioner was barred by the terms of the settlement, executed on the occasion of her marriage with her first husband, William Burgess, from claiming one-third of the sums bequeathed by Richard Burgess to the said William Burgess, who had died intestate.

By the settlement, a sum of £500 was assigned to trustees upon trust, after the death of William Burgess, for the petitioner for life, and after the subsequent trusts, under which that amount became

(1) 6 Ves. 385. (2) 11 Ir. Ch. R. 161. (3) 2 J. & H. 291.

payable to the said Richard Burgess, who bequeathed it to William Burgess, it was declared that "the provision hereby made and intended to be made for the said Elizabeth Jane Young, in the event of her viduity, shall be accepted, deemed, and taken in full lieu and bar of dower or thirds, to which she might be entitled at common law, or otherwise howsoever." The Master of the Rolls, in giving judgment, says, that with reference to the construction of this clause it is necessary to refer to the authorities which have been cited. He then refers to *Colleton* v. *Garth* (1); *Slatter* v. *Slatter* (2), and *Druce* v. *Denison* (3), and quotes Lord Eldon's definition of "thirds," which I have already read. At p. 170, he continues as follows:—"That case, it is said by counsel for the petitioner, does not apply, for here the words are 'in lieu and bar of dower or thirds, to which she might have been entitled at common law, or otherwise howsoever,' and there is no reference to personal estate. Now, if the words 'or otherwise howsoever' had been omitted, the case in 6 Simon would have applied. It is difficult, however, to hold without acting against the opinion of Lord Eldon in *Druce* v. *Denison* (3), that the word 'thirds' at common law or 'otherwise howsoever,' did not include the claim of a widow, under the statute of distributions." He then refers to *Gurly* v. *Gurly* (4) and the construction there put upon the words "at common law," and concludes thus at p. 171:—"In the present case, the clause does not refer to personal estate; and therefore the same reason does not apply for giving the meaning to the words 'at common law,' which was given to those words in *Gurly* v. *Gurly* (4); but I cannot reject the words in this case 'or otherwise howsoever,' and I am of opinion, on the whole, having regard to the observations of Lord Eldon, in *Druce* v. *Denison* (3), which case was recognized by the House of Lords in *Gurly* v. *Gurly* (4), and having regard also to the judgment of the Law Lords in the latter case, that the petitioner Elizabeth Jane Allen was barred by the settlement from claiming any part of the estate of her first husband, William Burgess, under the statute of distributions."

On the whole, notwithstanding that the annuity for the wife is

(1) 6 Sim. 19.
(2) 1 Y. & C. Ex. 28.
(3) 6 Ves. 385.
(4) 8 Cl. & F. 759.

M. R. 1893. COYNE v. DUIGAN.

spoken of as a jointure, and that it is not charged on any personal estate of the husband, I am of opinion that the intention and effect of the instrument is to bar the widow's right to a distributive share of the personal estate. The words are very general, and I think wide enough to attain this object.

I may add that though during the argument I suggested that the words "or otherwise" might be intended to refer to jointure under the statutes, that is in respect of equitable estates, and that then the case might range itself along with *Colleton* v. *Garth* (1), but the Master of the Rolls in *Burgess' Trusts* (2) did not take that view, and decided the case upon those very words. I am therefore of opinion that the claim of the widow here is barred by the settlement.

Solicitors for plaintiff: *John Roe & Co.*
Solicitors for defendant Eliza Duigan: *Hayes & Sons.*
Solicitors for defendant Michael Duigan: *Keily & Lloyd.*

W. L.

M. R. 1893. Dec. 4.

IN RE MIDLAND GREAT WESTERN (IRELAND) RAILWAY COMPANY; EX PARTE RORKE.

Costs—Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *s.* 80—*Administration obtained, after payment into Court, for the purpose of making legal title.*

Leasehold premises belonging to J. R. were taken by a railway company under their compulsory powers. J. R., who was then dead, had bequeathed the premises to his wife and six children, "share and share alike, the share of any individual dying to be equally divided amongst the survivors." No claim was made on behalf of the legatees for several years, until E. R., the surviving legatee, lodged an abstract of title with the Company. The Company, not being satisfied with the title, lodged the purchase-money and interest in Court. E. R. applied for payment out of the fund. The Court held that the legatees were tenants in common of the property, and directed payment to E. R. of her share, and the shares of the six deceased legatees to be placed to separate credits, and ordered the Company to pay E. R. the costs of and incident to the application, order, and proceedings thereunder, and all costs, charges, and

(1) 6 Sim. 19. (2) 11 Ir. Ch. R. 164.

expenses properly payable under the Lands Clauses Acts. E. R. then took out administration to each of the deceased legatees, and obtained payment of their shares. The Taxing Master declined to allow the costs of taking out these administrations, as not being covered by the order.

Held, that the costs were properly payable by the Company, and that the order should be amended by inserting a declaration to that effect. *Ex parte Kelly* (31 L. R. Ir. 137) followed.

Summons to Review Taxation.

This was an application on behalf of Elizabeth Rorke to review the decision of the Taxing Master, disallowing the costs of taking out certain administrations to deceased persons, which were taken out by Elizabeth Rorke, to enable her to obtain payment out of Court of certain monies which had been lodged in Court by the Railway Company under the Lands Clauses Acts.

The facts of the case were as follows:—On 6th March, 1893, an application by summons was made to the Court by Elizabeth Rorke for payment out to her of the sum of £128 (being the amount awarded, on 31st May, 1878, to John Rorke, with interest thereon, under the provisions of the Midland Great Western Railway of Ireland Act, 1877, for the purchase of a portion of certain premises held by John Rorke, under lease of 4th February, 1828), and for the costs of deducing title to the said premises, and furnishing same to the solicitor for the said Railway Company, and for the costs of the application.

On the hearing of the application, it appeared from the affidavit of the applicant that she claimed the fund in Court under the will of John Rorke, the person mentioned in the award; that he was, in fact, dead at the time the award was made, having died many years before.

By his will, made in 1833, he left the premises in question amongst his wife and children, share and share alike, the share of any individual of them dying to be equally divided amongst the survivors, and appointed Bernard Dowling his executor. The testator's widow, Mary Rorke, survived him, as did also six children, James, Thomas, John, Rosanna, Bridget, and Elizabeth, the applicant. At the time the award was made the widow was dead, and James and Thomas Rorke had left Ireland about

M. R. 1893. *In re* M. G. W. Railway Co. *Ex parte* Rorke.

1861, and had not been heard of for some twenty years. Rosanna, John, and Bridget Rorke died afterwards, and Elizabeth was the sole survivor in 1892.

The Company went into possession of the lands shortly after the making of the award, but no claim on behalf of the Rorke family was made until 1891, when an abstract of title was furnished to the Company, on behalf of Elizabeth Rorke. The Company, not being satisfied with her title, lodged the purchase-money, £75, with interest thereon, amounting in all to £128, in Court in 1892. There was no personal representative of the testator alive. Elizabeth Rorke claimed the fund, as surviving legatee, but the Court held that she was only tenant in common of the property (left by the will), along with the widow and other children, and the Court made an order for payment to Elizabeth Rorke of £18 5*s.* 9*d.*, being her share of the fund, and directed that the balance should be placed to the separate credits of the widow and other children, *i.e.* £18 5*s.* 9*d.* to the separate credit of each, and ordered the Company to pay to the applicant her costs of, and incidental to, the application, order, and proceedings thereunder, and all costs, charges, and expenses properly payable under the Lands Clauses Consolidation Act, or Acts incorporated therewith, when taxed and ascertained.

On July 18th, 1893, letters of administration to the six persons named in the schedule to the order of March 6th, 1893, were granted to Elizabeth Rorke, the gross value of the estate of each deceased being sworn at the said sums mentioned in the schedule to the said order.

On July 24th, 1893, the several sums standing to the separate credits were paid out to Elizabeth Rorke, as administrator of the several parties, on a separate application by her, but no mention was made of costs in the order for payment out of the monies. The solicitor for Elizabeth Rorke included in his bill of costs the costs of taking out administration to the several parties. The Taxing Master disallowed these costs, inasmuch as the order of 6th March, 1893, made no provision for them, either directly or impliedly, and there was no direction in the order for payment of the sums to the separate credits to the personal representatives of the several parties on production of the letters of administration.

A summons was taken out by Elizabeth Rorke, to review the taxation, and asking in the alternative for an order to amend the order of March 6th, 1893, or of July 24th, 1893, by directing that the costs of raising representation to the several deceased persons mentioned in the schedule of the order of March 6th, 1893, be paid by the Company when taxed and ascertained, and for the costs of the application.

An affidavit was made on behalf of Elizabeth Rorke that the administrations were not obtained for any other purpose except for obtaining payment of the sums of money mentioned in the order of March 6th, 1893; that in the case of five of the said administrations the deceased persons had died intestate, and left no personal estate whatever, save the sums mentioned in the said order. In the case of the sixth person there had been a will and a previous grant of probate; but all his assets had been fully administered, and his only unadministered assets was the sum to which he was declared entitled by the said order.

It was also stated that no application was made to the Court for these costs, as it was believed that they were covered by the order of March 6th, 1893.

William Kenny, Q.C., in support of the summons:—

Owing to the declaration made by the Court that the widow and children were entitled as tenants in common, it was necessary for the applicant to take out these administrations. This was done solely for the purpose of making title to the fund in Court.

These costs are payable by the Company under the order of March 6th, 1893, as costs of "proceedings relating to the payment out of Court": Lands Clauses Act, 1845, sect. 80; *Re South City Market Co., Ex parte Keatley* (1); *Re Dublin Junction Railways; Ex parte Kelly* (2).

If necessary, the order of March 6th, 1893, should be amended, and an express declaration inserted in it as to these costs.

J. Herbert Shaw, for the Company:—

If the contention of the applicant is correct, then in every case where there is an incomplete title, and it is afterwards cured, the

(1) 25 L. R. Ir. 265. (2) 31 L. R. Ir. 137.

M. R. 1893.

In re M. G. W. Railway Co. *Ex parte* Rorke.

Company must pay the costs of curing such a title. Here the lands were taken in 1878, but no claim or abstract of title was lodged till 1891. The Company might have relied on the Statute of Limitations, as they have been in possession since 1878. The failure of the parties to deliver an abstract amounted to a wilful neglect to make out a good title: *Ex parte Dowling* (1). If the money had been claimed at the proper time costs would have been saved, inasmuch as three of the legatees died since 1878. The meaning of the order of March 6th, 1883, was that the Company should be relieved of any further costs. If the applicant considered herself entitled to these costs, which were incurred subsequent to the order, she should have asked for them at the time, and the Court cannot give them now. *Ex party Keatley* (2) was decided under sect. 82. *Ex parte Kelly* (3) is more in point; but the decision of the Vice-Chancellor there went farther than any previous case, and ought not to be followed. No distinction was taken there between sect. 80 and sect. 82. Even that case is distinguishable, for there the lands had been recently taken by the Company, while here the parties entitled might have made a good title, if they had come forward fourteen years before.

The Master of the Rolls:—

In this case Mr. Shaw has said everything that could be said on behalf of the Company. I do not propose to lay down any general rule applicable to all cases. I decide this case on its own facts. John Rorke the testator died some sixty years ago, as appears from the probate of his will, which is dated in 1833. By that will he bequeathed his property, including the premises in question, which were leasehold, amongst his wife and children, share and share alike, the share of any individual of them dying to be equally divided amongst the survivors, and appointed Bernard Dowling his executor. The testator left him surviving his widow, Mary Rorke, and six children, namely, James Rorke, Thomas Rorke, John Rorke, Rosanna Rorke, Bridget Rorke, and Elizabeth Rorke. When that will came before me on the 6th March, 1893, I decided that the widow and children took

(1) 7 L. R. Ir. 173. (2) 25 L. R. Ir. 265. (3) 31 L. R. 137.

as tenants in common. In 1878 the Company took the lands in question under their parliamentary powers, and in the award of the arbitrator, made in that year, the person to whom the compensation, £45, afterwards increased to £75, was awarded was described as "John Rorke." That is a not unimportant fact, and it is one for which the beneficiaries under the will were not responsible. The Company did not lodge the compensation money until 1892; but there is no blame to be attached to them for not lodging it before, as no claim was made or title lodged with them until 1891, when the Rorke family became alive to their interests, and an abstract of title on behalf of the representatives of John Rorke was lodged with the Company, who, being advised that a good title was not shown, lodged £125, the amount of the compensation, with interest at 5 per cent. in Court, to the credit of John Rorke and all other persons interested.

It was incidentally stated by Mr. Shaw that the Company had acquired a title to the lands under the Statute of Limitations, although they did not now rely on that point. But in my opinion I have not to decide any such question. Suppose the Company had lodged the money in 1878, what was the position of affairs then? That was forty-five years after the death of John Rorke. I am not aware whether there was a personal representative of John Rorke alive at the time, but his estate must have been long since administered, and the persons beneficially entitled under his will to the money would have had to be ascertained. Mary Rorke, the widow, was then dead, James Rorke and Thomas Rorke had left the country about 1861, and had not been heard of for over twenty years, and must therefore have been presumed to be dead; Rosanna Rorke, John Rorke, and Bridget Rorke died subsequently, Elizabeth Rorke being the only survivor in 1892. Under these circumstances application was made by her on March 6th, 1893, to have the money paid over to her. If any application had been made in 1878, it would have been necessary to have taken out administration to the persons who were then dead, and as the money was divisible into seven shares, there might have been seven applications.

I made an order on the application directing the shares of the six members of the family who were dead to be put to separate credits, and in so doing I intended to save the Company from any

M. R. 1893.

In re M. G. W. Railway Co. *Ex parte* Rorke.

future expense of attending on applications to pay out these shares. But I never intended to decide that the costs of taking out administration to these six persons should be borne by the persons applying to have the sums so standing to a separate credit paid out.

I do not see any hardship in construing sect. 80 of the Lands Clauses Acts, 1848, as it has been construed in the cases in this country, and in England, which have been referred to by counsel. It must be remembered that an owner of property may be quite content to remain with his title as it is, and may not care to make it better. But if his land is taken from him compulsorily he has to go further, and must show at least something more than a holding title. The order of March, 1893, was not intended, in my opinion, to be an adjudication as to the costs of taking out administration, and my recollection is corroborated by the affidavit made on behalf of the applicant. I do not recollect that any point was raised as to these costs on behalf of the Company, and Mr. Shaw has not said that any such point was made by him. The Taxing Master in his report says that by the order of March, 1893, six several sums of £18 5*s.* 9*d.* each were directed to be transferred to separate ledger accounts, and to the separate credit of the personal representatives of the six deceased persons named in the order, and that the applicant was awarded her costs of, and incidental to, the application, order and proceedings thereunder, and all costs, charges, and expenses, properly payable under the Lands Clauses Acts, when taxed and ascertained. That the costs lodged included the costs of applications to the Probate Division for leave to apply for grants under which the funds to the separate credits had been drawn out of Court. That the solicitor for the Company objected to the costs of the proceedings in the Probate Division, and of the administrations, being allowed, and alleged that the Court expressly declined to make an order for such costs. That he declined to allow these costs, inasmuch as the order made no provision for them either directly or impliedly, and there was no direction to that effect in the order for payment of the sums to the separate credits to the personal representatives of the several parties on the production of the letters of administration. I am of opinion that the costs of these administrations ought to have been

M. R. 1893.

In re M. G. W. RAILWAY CO. Ex parte RORKE.

allowed, and that the Company must pay them. In so deciding, I am not going beyond the decision of the Vice-Chancellor in *Ex parte Kelly* (1). I shall therefore amend the order of March, 1893, and make a declaration that the costs of these administrations shall be borne and paid by the Company, so far as the administrations were necessary for the purpose of making title to the money in Court. Such a limitation should be made, as otherwise the Company might have to pay for the costs of administrations, though taken out for other purposes, and to cover other assets. That probably does not arise in this case, as each administration that I have examined is limited to £18 5*s.* 9*d.*, the amount of the share of each deceased person. I ought, however, to have been specifically asked for the costs now sought, when the case was previously before me; and under the circumstances, I shall direct that the parties shall abide their own costs of this application.

Solicitor for Elizabeth Rorke: *Henry Bonass.*
Solicitor for the Company: *John Kilkelly.*

W. L.

V.-C. 1894.

Jan. 26.

WILEY *v.* SMITH.

(1893. No. 520.)

Action by lessee against assignee—Indemnity in respect of previous action by lessor—Third party—Costs between solicitor and client—Form of order.

In an action by a lessee against his assignee to recover sums paid by the lessee for rent, damages, and costs in a previous action brought against him by the lessor and his own costs of such previous action, the defendant admitted his liability for the sums paid for rent and damages, but brought in a further assignee as third party, who admitted his liability to indemnify the defendant. The Court decided that the plaintiff was entitled to recover portion of the amount paid by him to the lessor for costs of the previous action, and also the plaintiff's own costs of the same:—

(1) 31 L. R. Ir. 137.

V.-C. 1894.

WILEY v. SMITH.

Held, that the plaintiff was entitled to recover from the defendant his costs of the present action including orders as to the third party as between solicitor and client; and that the defendant in addition to the amounts paid by him was entitled as against the third party to his costs of action and the third party proceedings, those of the action to be taxed as between solicitor and client, but having regard to the fact that they were payable by the third party.

Form of order.

MOTION FOR JUDGMENT.

A lease was made to William Wiley. He assigned to the defendant Smith, and the latter assigned to Joseph Richardson. William Wiley died, and the plaintiff Sarah Wiley was his personal representative.

The lessor's estate having become vested in Maria Tench, she and one Richard Stokes brought an action (1) against the plaintiff and certain legatees under the will of William Wiley for rent and damages for dilapidations. Notice of this action was given to Smith, and a correspondence ensued between Sarah Wiley and him. Sarah Wiley, after incurring some costs in that action, settled it, paying £17 10*s.* arrears of rent, £102 10*s.* for dilapidations, and £51 9*s.* 8*d.* the taxed costs of the plaintiffs therein. Sarah Wiley's own costs of that action were, on notice to Smith, taxed as between solicitor and client at £27 5*s.*

The present action was for the recovery of these sums, and the defendant, pursuant to order of the 26th June, 1893, served a third party notice, under Order XVI., R. 49, on John Richardson and Samuel M'Comas, the executors of Joseph Richardson, then deceased.

On the application of the defendant, under Order XVI., R. 53, for directions, the third parties admitted their liability to indemnify the defendant, and he admitted his liability to the plaintiff in respect of the sums of £17 10*s.* and £102 10*s.*, but disputed his liability in respect of the sums of £51 9*s.* 8*d.* and £27 5*s.*, and by consent it was, on the 7th November, 1893, ordered that the action should be tried without further pleadings on motion for judgment, the evidence to be by affidavit, and the third parties to be at liberty to appear on such motion.

(1) 1892. No. 306. M. R.

THE VICE-CHANCELLOR now decided that the plaintiff was entitled to recover the said sum of £27 5*s*., and also the costs of the plaintiffs in the action of *Tench* v. *Wiley*, save so much thereof as was incurred by making the legatees defendants.

Matheson, Q.C. (with him *Arthur C. Meredith*), for the plaintiff, contended that he was entitled to be fully indemnified, and that his costs, not only of the former but also of the present action, should be taxed as between solicitor and client.

Henry Richards, for the defendant.

S. L. Brown, for the third parties.

THE VICE-CHANCELLOR said he would follow the precedent in Seton, Judgments and Orders, 5th Ed., p. 1779, No. 12, and the following judgment was drawn up:—

"THIS COURT DOTH DECLARE that the defendant is liable on foot of the covenant in the deed of assignment dated the 1st day of December, 1869, in the statement of claim mentioned, to indemnify the plaintiff, as personal representative of William Wiley, deceased, against the liability of the assets of the said William Wiley on foot of the covenants on the part of the lessee in the lease dated the 21st day of May, 1859, in the statement of claim mentioned; and, accordingly, this Court doth declare that the defendant is liable to recoup the plaintiff the sum of £102 10*s*. for breaches of the covenant to repair and £17 10*s*., one half-year's rent of the premises in the said statement of claim mentioned, up to the 25th day of March, 1892, and also the sum of £27 5*s*., being the taxed costs of the defendants in the action of Maria Tench and another against Sarah Wiley and others, Record No. 1892—306, and also the plaintiff's taxed costs in said action of *Tench* v. *Wiley*, save so much thereof as were incurred by making the legatees of William Wiley deceased, parties defendants in the said action, said costs being agreed upon by consent of the parties at the sum of £50 15*s*.; and this Court doth declare the defendant liable to pay the plaintiff's costs incurred in this action, including the costs of the orders dated respectively the 26th day of June, 1893, and 7th day of November, 1893, such costs to be taxed as between solicitor and client. And as to the question of indemnity, this Court doth declare that the defendant is entitled to be indemnified by the said John Richardson and Samuel M'Comas as

V.-C. 1894.

WILEY v. SMITH.

executors of Joseph Richardson, deceased, against all amounts payable by him under this judgment. AND IT IS ORDERED that the defendant recover against the said John Richardson and Samuel M'Comas, as such executors as aforesaid, any amounts so paid by him, and his own costs of this action and of the third party proceedings, to be taxed by the Taxing Master, those of the action as between solicitor and client, but having regard to the fact that they are payable by the third party."

Solicitors for the plaintiff: *Collis & Ward.*
Solicitors for the defendant: *S. S. & E. Reeves & Sons.*
Solicitors for the third parties: *Tobias & Co.*

D. M'C. M.

V.-C. 1894.

Jan. 29.

IN THE MATTER OF THE BLACKROCK TOWNSHIP COMMISSIONERS; EX PARTE FORDE.

(1894. No. 38.)

Lands Clauses Act—Payment out of Court—Title by possession.

Money lodged in Court under the Land Clauses Acts paid out on a title based on continued possession by a tenant without payment of rent for fifteen years after the expiration of his own and the next superior interest.

PETITION for payment out of Court of a sum of £712 10*s.*, lodged in respect of premises taken by the Blackrock Township Commissioners under compulsory powers.

The evidence of the petitioner showed:—By lease dated the 4th December, 1851, Thomas M'Evoy, with the consent of Isabella M'Nulty, Margaret M'Nulty, and Sarah M'Nulty, demised the premises to James Forde for twenty-five years and six months, from the 1st June, 1851, at a rent of £50.

James Forde died on the 13th April, 1865, having made a will whereby he bequeathed the premises to the petitioner after the death of Mary Forde, subject to certain conditions. Probate was granted to Mary Forde, one of the executors, on the 18th August, 1865.

From the death of James Forde to the 1st December, 1876, when the lease expired, the petitioner was in possession by himself or his undertenants, and paid the rent reserved. He thenceforth continued to pay the rent to Margaret M'Nulty, the survivor of the lessors up to April, 1878, when her interest, as the petitioner was informed, expired.

From April, 1878, the petitioner remained in undisturbed possession of the premises, and in receipt of the rents and profits, but never paid any rent in respect of same.

Mary Forde died on the 21st December, 1879. The petitioner complied with the conditions in the will.

The Commissioners took possession of the premises in September, 1893.

The arbitrator, by his award dated the 21st April, 1893, awarded to T. J. Farley, as owner in fee, 1*s.*; to W. H. Maffett, as owner in fee-farm, 1*s*; and to the petitioner (without specifying nature of interest), £712 10*s.*, with the addition in the last two cases "Rent undisturbed."

The Commissioners paid the money into Court, as both the petitioner and the said W. H. Maffett claimed it.

J. F. Moriarty (with him *C. Dillon*), for the petitioner, cited *Ex parte Winder* (1); *Re Sterry's Estate* (2); *In re Metropolitan Street Improvement Act*, 1877; *Ex parte Chamberlain* (3).

W. G. Jefferson, for the Commissioners, stated that W. H. Maffett had appeared before the arbitrator, and made a claim.

There was no appearance for T. J. Farley or W. H. Maffett, who had notice of the application.

THE VICE-CHANCELLOR made an order for payment out, after advertisements.

Solicitor for the petitioner: *John Cavanagh.*

Solicitor for the Commissioners: *John M. Williamson.*

D. M'C. M.

(1) 6 Ch. Div. 696. (2) 3 W. R. 561. (3) 14 Ch. Div. 323.

Appeal.
1892.

Nov. 15, 16, 22.

SHEA *v.* MOORE (1).

(1891. No. 13,211.)

Judgment—Effect of under Pigot's Act—Charge on land—Right to foreclosure—Equitable mortgage—Statute of Limitations—Trustee in possession.

W. H. M. being entitled to three houses in the county of Dublin, held under a lease for lives renewable for ever, by a settlement dated the 28th June, 1837, executed on his marriage with E. K., conveyed the premises to F. W. M. and F. B K., upon trust for W. H. M. for life, or until bankruptcy or failure of credit, with remainder to E K. for life; and after the death of the survivor upon trust in default of issue (which event happened) to reconvey the premises to W. H. M., his heirs, and assigns. W. H. M., on the 31st May, 1831, gave a bond to F. W. M. for the sum of £1000, conditioned for payment of £500, with interest at 5 per cent., on which judgment was entered in Trinity Term, 1841, and by an award of the 11th December, 1841, made on a submission to arbitration between F. W. M. and W. H. M., it was declared that the judgment should stand as security for £279 15*s*. By an order of the Lord Chancellor, dated the 22nd February, 1842, in a cause petition of M. *v.* M., it was ordered that W.H. M. should pay to F.W. M. the sum of £600, with interest at 6 per cent., and this order was duly registered as a judgment under 3 & 4 Vict. c. 105, s. 28. By a settlement of 30th July, 1851, and an indenture of even date, made on the marriage of F. W. M. with G. K., these judgments and the sums secured by them were assigned to L. B. and R. H. C. upon trust to raise the amounts and stand possessed thereof in trust for F.W. M. for life, and after his decease in trust for his wife for life, and, subject thereto, in trust for the children of the marriage.

W. H. M. became embarrassed shortly after his marriage, and his wife entered into possession of the income of the trust property. W. H. M. died on the 6th September, 1861; and Mrs. M. survived until the 29th September, 1877. From 1874 the defendant F. W. M. was in actual receipt of the rents for her, and after her death, thinking that he was *bona fide* entitled to the property as heir-at-law of W. H. M., he retained the rents himself. In 1891, the defendant F. W. M. discovered that he was not entitled to the property, and that the title was in the plaintiffs; but he claimed the right to retain the rents for the purpose of satisfying the sums due under the judgments, and 50 years' interest as a credit against the rents:—

Held (reversing the decision of the Master of the Rolls), that there was no right in F. W. M., under the judgments, to recover the lands in a foreclosure

(1) Before Walker, C., Palles, C.B., and Fitz Gibbon and Barry, L.JJ.

action; that any claim which F. W. M. had under the judgments was barred by the Statute of Limitations, and that the plaintiffs could compel a re-conveyance without paying off the amount due on the judgments.

By indenture of lease, dated the 30th May, 1836, William Jenkins and John Egan granted to Thomas Arkins, his heirs and assigns, a plot of ground situate on Glasnevin-road, in the county of Dublin, for three lives, with a covenant for perpetual renewal, subject to a rent of £14 a-year.

By conveyance, dated the 28th June, 1836, Thomas Arkins conveyed to William Henry Moore the lessee's interest in the aforesaid lease.

By indenture of marriage settlement, bearing date the 28th June, 1837, made between William Henry Moore, of the first part, George Marshall Knipe and Elizabeth Knipe, of the second part, and Francis Wellington Moore and Francis Blake Knox, of the third part, William Henry Moore conveyed the lessee's interest in the premises to Francis Wellington Moore and Francis Blake Knox, their heirs and assigns, in trust for the said William Henry Moore for life or until bankruptcy, and after his death or bankruptcy, in trust to pay the rents and profits of the premises to Elizabeth Knipe for life, and after the death of the survivor upon the trusts therein contained for the issue of the said marriage, and in default of such issue upon trust to reconvey the premises to the said William Henry Moore, his heirs and assigns.

There was no issue of the marriage, and William Henry Moore became embarrassed in his circumstances, and left the country to avoid his creditors. He died on the 6th September, 1861. On the death of William Henry Moore, Elizabeth Moore, otherwise Knipe, entered into possession of the property, and receipt of the rents and profits, and continued in such possession down to 1874. Subsequently to 1861 she married a Mr. King. Francis Blake Knox died, and no new trustee was appointed in his place. In 1874, the defendant, Francis Wellington Moore, as surviving trustee of the settlement, entered into possession of the premises and receipt of the rents and profits, and he applied the said rents and profits in accordance with the trusts of the said settlement until the year 1877, when the said Elizabeth Moore died. She died on the 29th September, 1877. The plaintiffs,

Appeal. 1892. SHEA v. MOORE.

William F. L. Shea, Emily Moore, Elizabeth Moore, and Isabella Moore, were the co-heirs of William Henry Moore, who died intestate and without issue, and they brought the action for the purpose of carrying the trusts of the settlement of 1837 into execution. The plaintiffs did not become aware of their rights under the marriage settlement until the month of February, 1891.

The lease of the 30th May, 1836, had been converted into a fee-farm grant pursuant to the Renewable Leasehold Conversion Act.

The defendant, by his defence, pleaded that he had retained possession of the lands, believing *bona fide* that he was the heir-at-law of the said William Henry Moore, and it was not until February, 1891, when he obtained advice on the title, with the intention of selling the property, that he discovered that he was not heir-at-law of the said William Henry Moore, and that the plaintiffs were. The defendant then informed the plaintiffs of the fact, and offered to convey the premises to the plaintiffs, on having certain incumbrances discharged, which were due to the defendant. The particulars of these were as follows:—

1. A debt secured by a judgment in Trinity Term, 1841. Wm. Henry Moore executed a bond to the defendant, F. W. Moore, in the penal sum of £1000, conditioned to be void on the payment of £500, with interest at 5 per cent., and in Trinity Term, 1841, the defendant obtained a judgment upon said bond against William Henry Moore for the penal sum of £1000, and £2 1*s.* 11*d.* costs. This judgment was duly registered under the 3 & 4 Vict. c. 105, sect. 28, so as to affect the estate of the said William Henry Moore in the premises.

2. By an order of the Lord Chancellor of Ireland, dated the 22nd February, 1842, made in a cause petition matter, in which the defendant Francis Wellington Moore was petitioner, and the said William H. Moore was respondent, concerning a certain award therein mentioned, dated the 11th December, 1841, it was ordered among other things that the said William H. Moore should pay to the said Francis Wellington Moore the sum of £600, with interest thereon at the rate of 6 per cent. The said order was duly registered so as to affect the estate of the said William H. Moore in the premises, under the provisions of the

statute 3 & 4 Vict. c. 105, sect. 28. These judgments were duly re-registered from time to time.

By an award, dated the 11th Dec., 1841, reciting a certain deed of submission between the said Francis W. Moore and William H. Moore, which, by order made in the said matter on 12th Feb., 1840, had been made a rule of the Court of Chancery in Ireland, it was amongst other things found that the said judgment for the penal sum of £1000 conditioned for the payment of £500, with interest, should stand as a security for the payment of the principal sum of £279 15*s.*

By a settlement, dated the 30th July, 1851, and made between the said F. W. Moore of the first part, the Rev. Thomas Kilby and Georgiana Kilby of the second part, and the Rev. Louis George Brown and the Rev. Robert H. Cox of the third part, executed on the marriage of the defendant and Miss Kilby, reciting the said bond and judgment, and award, and the order in Chancery, and reciting that there then remained due on foot of the said judgment the principal sum of £279 15*s.*, together with the sum of £135 3*s.* 3*d.* arrears of interest, and the sum of £2 1*s.* 11*d.* costs, making together the sum of £417 0*s.* 2*d.*, and that the principal sum of £445 17*s.* (part of the said sum of £600), together with the sum of £262 5*s.* 11*d.* for arrears of interest, making together the sum of £708 2*s.* 11*d.* remained due under the order of the 22nd February, 1842, and reciting that the said William H. Moore was possessed of an estate of inheritance in the said lands, and that the principal moneys and interest had been assigned by deed of even date to Louis Brown and Robert H. Cox upon the trusts of the said indenture, it was witnessed that the trustees should stand possessed of these moneys, on trust for Francis Wellington Moore for life, and after his death for Georgiana Blanche Moore for life, with remainder to the children of the marriage.

The defendant had received out of the property since the death of Mrs. King £1402 13*s.* 10*d.*, and he claimed that there was due to him for interest, on foot of the judgment and the Chancery order, from the 30th July, 1851, to July, 1891, £1033 14*s.*, and there was due to the trustees of his marriage settlement £279 15*s.* principal, and £135 3*s.* 3*d.* interest, up to the 30th July, 1851, and £2 1*s.* 11*d.* for costs on foot of the judgment of Trinity

Appeal. 1892. SHEA v. MOORE.

Term, 1841, and £445 17*s.* principal, and £262 5*s.* 11*d.* interest, under the Chancery order of the 30th July, 1851, said sums making together £1125 3*s.* 1*d.* The defendant claimed to retain the sum of £1402 13*s.* 10*d.* as a credit against the sums due to himself and his trustees, and also claimed to be paid the balance out of the trust property.

The Master of the Rolls, by his judgment of the 2nd June, 1892, decided that the defendant was only bound to re-convey the estate on payment of the amount due to him for principal and interest under the judgment and order, after giving credit for the rents and profits of the lands received by him, or which might without wilful default have been received by him, since the 29th September, 1877 (1).

(1) The following is the judgment of the MASTER OF THE ROLLS:—

After referring to the pleadings, and the affidavit of the defendant, and the documents referred to therein, his Lordship proceeded as follows:—

The interest of William Henry Moore in the lands was twofold: he had a life estate, and he had also a contingent reversion in fee. The former came to an end in the year 1861; the latter did not fall into possession until the year 1877, and might never have come into existence at all as an actual interest. The debts, as a personal liability, were barred long before the year 1877, but the question is whether, as an equitable charge on the lands, lapse of time has barred them, and if so, to what extent. I think it is clear that if the charge was in existence, and capable of being enforced, in the year 1877, it is not barred by time since then, because the defendant has been in possession of the lands and in receipt of the rents ever since. No doubt his possession was referred by himself to a title different from that which he actually had. He supposed himself to be his brother's heir-at-law—a singular belief for an educated man to entertain, and all the more so because he is stated to have been at one time a solicitor. He is now a clergyman. But he swears he did entertain it honestly, and he gives in his affidavit the name of the counsel who told him that he was entitled in that way. I dare not discredit his oath, which is not encountered by any conflicting evidence, and which, indeed, amounts to an admission against his present interests, and raises a difficulty in his way rather than the reverse. But though he supposed his right to have been that of heir-at-law to William Henry Moore, his real position is this:—He was surviving trustee of the settlement of the 28th June, 1837. Under that settlement he had a legal estate, which he was, no doubt, bound to convey to "William Henry Moore, his heirs, executors, administrators, and assigns." But he himself was by virtue of his charges an assign, in equity, of a portion of the estate, if and so far as his charges were subsisting. Had an action been brought against him by the plaintiffs, whose ignorance of their title, not being brought about by any fraud or contrivance, cannot alter their position,

The plaintiffs appealed.

Appeal. 1892.

SHEA v. MOORE.

Robertson, Q.C., and *Meredith, Q.C.*, for the appellants:—

The remedy by foreclosure has not been attempted here, and it is now barred by the Statute of Limitations, twelve years since 1877. The principle of *Hugill* v. *Wilkinson* (1), that although the debt as distinguished from the liability is gone, the mortgagees may be paid, does not apply here, because the securities here being judgments and not mortgages, you cannot foreclose at all. The personal liability was barred by section 20 of the Common Law Procedure Act of 1853, the liability and remedy for raising it out of the land was barred by the 40th section of 3 & 4 Wm. 4, c. 27: *Conlan's Estate* (2). The defendant was in possession as a

they could not have compelled him to convey, except on the terms of their doing equity, and paying or securing his own charges, as if in a redemption suit.

Then, was the remedy against the lands barred in the year 1877? On this point I am bound by the case of *Hugill* v. *Wilkinson* (38 Ch. D. 480), if it applies; and that case decides that a remedy by foreclosure is in effect a right to bring an action for recovery of land, and that time begins to run against such a right in the case of a reversionary interest at the time when the reversionary interest vests in possession. [THE MASTER OF THE ROLLS then proceeded to read the facts of the case of *Hugill* v. *Wilkinson* (38 Ch. D. 480), and the judgment of Mr. Justice North, and then continued as follows]:—This decision is, in my opinion, binding upon me if it applies.

This case was, however, sought to be distinguished from the present on the ground that in Ireland a mortgagee's right is to a sale, and not to a foreclosure. It is true that in this country a mortgagee nearly always obtains both a foreclosure and a sale. That is the regular course of the Court, and is founded on a manifest convenience. But as a question of jurisdiction there can be no doubt at all that the power to decree a foreclosure simply exists, and always has existed, here. It will be nowhere found to be stated that the power of the Court in this respect is different from that of the Courts in England, and in *Wrixon* v. *Vize* (3 Dr. & War. 104), Lord St. Leonards states that this is so, while in such books as Burroughs and Gresson, and the like, it is always stated as matter of practice merely. In the Judicature Act, and the Rules under it, the right to foreclosure is expressly recognized as an *existing* right. See Judicature Act, sect. 36, and Order LV., Rule 7, of the Rules of 1891. The form of indorsement for a claim by a mortgagee differs in the old and new Rules, but that does not affect the question of jurisdiction. But it is suggested that the remedy of a judgment creditor under Pigot's Act, 3 & 4 Vict. c. 105, is only by receiver, but see sect. 22 of that Act, which pro-

(1) 38 Ch. Div. 480. (2) 29 L. R. Ir. 199.

Appeal. 1892.

SHEA v. MOORE.

trustee, and he could not set up a title adverse to his *cestui que trust*: *Attorney General* v. *Munro* (1). A trustee cannot revive a debt once it is barred: *Briggs* v. *Wilson* (2); *Stewart* v. *Connick* (3).

The mere right of foreclosure, if not exercised, will not take the case out of the Statute of Limitations, but a judgment creditor has no right to foreclose. In order to give the right of foreclosure, there must be an actual ascertained estate in the lands in some person; therefore a judgment creditor who has no estate can never foreclose: *Sampson* v. *Pattison* (4); *Pain* v. *Smith* (5). In Ireland, the remedy of the mortgagee is a sale and not foreclosure, the same as in the case of an equitable mortgage by deposit in England: *Simpson* v. *Morley* (6); *Tennant* v. *Trenchard* (7). A bill to foreclose is not a proceeding to recover: *Wrixon* v. *Vize* (8); *Heath* v. *Pugh* (9); *O'Brien* v. *Fitzgerald* (10).

The fact that the estate was in reversion until 1877 makes

vides that a "judgment . . . shall operate as a charge upon all lands . . . of or to which such person (*i.e.* the debtor) shall . . . be seised, possessed, or entitled, for any estate, &c., . . . and that every such judgment creditor shall have such and the same remedies in a Court of Equity against the hereditaments so charged as he would be entitled to in case the person against whom such judgment shall have been so entered up had power to charge the same hereditaments, and had by writing under his hand agreed to charge the same with the amount of such judgment debt and interest thereon." If the owner of an estate agrees in writing to charge it with a sum of money, one of the remedies of the creditor is to sell the land, which he can do in this Court, or now in the Court of the Land Judges.

I am unable to distinguish *Hugill* v. *Wilkinson* (38 Ch. D. 480) on this ground from the present case, if the question had arisen in the year 1877, and I have already said that what has since occurred cannot in any judgment deprive the defendant of any rights he then had. What then is the extent of the defendant's rights? In 1877 he was entitled to the principal sums secured by the judgment of 1841, and the Chancery order of 1842, respectively; and since the judgments secured not only the principal but the interest at a specified rate, I am unable to limit the claim for interest otherwise than by the amount then actually due, irrespective of the statute. If Wm. Henry Moore had executed a deed of charge in express terms charging his reversionary estate with principal and interest, and if *Hugill* v. *Wilkinson* (38 Ch. D. 480) is good law, the

(1) 2 De G. & Sm. 163.
(2) 5 De G. M. & G. 12.
(3) Ir. R. 5 C. L. 562.
(4) 1 Hare, 533.
(5) 2 M. & K. 417.
(6) 2 K. & J. 71.
(7) L. R. 4 Ch. App. 537.
(8) 3 Dr. & War. 104.
(9) 7 App. Cas. 235.
(10) 5 Ir. Eq. R. 593.

no difference. The meaning of the word "recovered" is being in actual possession: *Doe* v. *Liversedge* (1). He cannot in any case get more than six years' interest: *Edmunds* v. *Waugh* (2); *Stead's Mortgaged Estates* (3). If a man goes into possession as trustee he is estopped from saying that he is in otherwise: *Neligan* v. *Roche* (4). He cannot assume a position which would conflict with his duty as a trustee: *Attorney-General* v. *Munro* (5); *Hamilton* v. *Wright* (6).

Carson, Q.C., and *Samuels*, for the respondent:—

A judgment creditor has a right to foreclose, as having a lien on the land by section 22 of 3 & 4 Vict. c. 105: *Henry* v. *Smith* (7). A mortgagee had no more power over the estate than a judgment creditor: *Baldwin* v. *Belcher* (8). The judgment Act in effect made the creditor an equitable mortgagee: *Ex parte*

statute would only begin to run at all, so far as the estate is concerned, when the estate fell into possession, though as a personal debt the whole would have been barred. I cannot separate principal and interest, and say that only six years' interest is charged, if, for the purposes of the statute the creditor was not bound to sue till the reversionary estate vested in possession. Of course the position would have been the same if William Henry Moore had survived his wife without having issue.

I am, therefore, I confess, reluctantly of opinion that there must be an account of what is due to the defendant for principal and interest upon the judgment and order, and also of the rents and profits of the lands, which have been received by the defendant, or which might without wilful default have been received by him since the 29th September, 1877, and a balance must be struck, and upon payment by the plaintiffs of the balance, if any, remaining due to the defendant, over and above all just credits and allowances, it will be declared that the defendant is bound to re-convey the premises, free from incumbrances created by him, to the plaintiffs. I shall reserve further consideration, and give liberty to apply. But as the defendant has put forward grossly exaggerated and unmaintainable claims—I refer in particular to the memorandum referred to in his affidavit, which was forwarded to the plaintiffs, which claims have been properly abandoned at the bar, and as the plaintiffs have claimed to have the lands discharged from the defendant's judgment and interest, to which they are not entitled, both parties must abide their own costs up to and including this hearing. W. L.

(1) 11 M. & W. 517.
(2) L. R. 1 Eq. 418.
(3) 2 Ch. Div. 713.
(4) Ir. R. 7 Eq. 332.
(5) 2 De G. & Sm. 163.
(6) 9 Cl. & Fin. 111.
(7) 2 Dr. & War. 381.
(8) 6 Ir. Eq. Rep. 428.

Appeal. 1892. SHEA v. MOORE.

Boyle (1). The judgment creditor, once he has registered his judgment is entitled to a decree for sale: *Footnor* v. *Sturgis* (2). There must always be a day for showing cause before the equity of redemption was foreclosed: *Price* v. *Carver* (3); *Lechmere* v. *Clamp* (4). An acknowledgment in writing within sect. 14 of 3 & 4 Wm. 4, c. 27, given within twenty years before the action, is sufficient to keep the judgment alive as against the conusor: *Harty* v. *Davis* (5). See also *Becher* v. *Delacour* (6). An acknowledgment by an executor will take a case out of the Statute of Limitations against all parties beneficially interested: *Toft* v. *Stephenson* (7). A trustee may make an admission: *Re Lakes' Trusts* (8).

Nov. 22.

WALKER, C.:—

This was an action brought by the co-heiresses-at-law of Wm. Henry Moore to have the trusts of a settlement dated 28th June, 1837, carried into execution.

Wm. Henry Moore was on 28th June, 1837, entitled to premises on Glasnevin-road, held under a lease for lives renewable for ever; and on his marriage with Elizabeth Knipe, he, by settlement of that date, conveyed the premises to the defendant Francis Wellington Moore and Francis Blake Knox, upon trust for William Henry Moore for life, or till bankruptcy or failure in credit, remainder to Elizabeth Knipe for life; and after the death of the survivor upon trust, in default of issue, which happened, to re-convey to William H. Moore, his heirs and assigns.

William H. Moore on the 31st May, 1841, executed his bond to F. W. Moore in the sum of £1000, with 5 per cent. interest, on which judgment was entered in Trinity Term, 1841, and by an award, dated the 11th December, 1841, it was declared that the judgment should stand as security for £279 15*s*. By an order of the Lord Chancellor, dated the 22nd February, 1842, it was ordered that William Henry Moore should pay to F. W. Moore the sum of £600, and interest at 6 per cent., and this order was registered as a judgment.

(1) 3 De G. M. & G. 530.
(2) 5 De G. & Sm. 736.
(3) 3 M. & C. 157.
(4) 30 Beav. 218.
(5) 13 Ir. L. R. 23.
(6) 11 L. R. Ir. 200.
(7) 1 De G. M. & G. 28.
(8) 63 L. T. 416.

By a settlement dated 30th July, 1851, and deed of even date, made on the marriage of F. W. Moore with Miss Kilby, those judgments and the sums due for principal and interest thereon, were assigned to the Rev. Louis Brown and Rev. Robert H. Cox, upon trust to raise the amounts and stand possessed thereof in trust for F. W. Moore for life, and after his decease in trust for his wife for life, and subject thereto in trust for the children of the marriage.

It would appear that William H. Moore became embarrassed shortly after his marriage, and that his wife became entitled to, or assumed, possession. William H. Moore died 6th September, 1861. Mrs. Moore lived till 29th September, 1877, and from 1874 the defendant was in actual receipt of the rents for her.

It thus appears the defendant entered into possession as trustee during Mrs. Moore's life, and applied the rents accordingly; and after her death, under (as he states) the belief that he was his own *cestui que trust*, retained possession of the rents, supposing himself beneficially entitled—a belief which he says existed to February, 1891. He admits his liability to account for the rents, but claims to deduct the sums due for principal under the judgments and some fifty years' interest as a credit against the rents received. Other than by his receipt, it was not alleged that any direct payment or acknowledgment had been made which would prevent the operation of the Statute of Limitations against these demands.

The writ in the present action was issued on 5th November, 1891. The Master of the Rolls in effect decided that there was a right in F. W. Moore, under the judgments, to recover the lands by a foreclosure action, and that this right was not barred on the 29th September, 1877, as the estate of William H. Moore was reversionary till then, and that as he filled the position of both trustee and judgment creditor, and was in possession, the real *cestui que trust*, claiming through William H. Moore, could not compel a re-conveyance of the estate without paying off the entire principal moneys and interest due—some fifty years' interest—and he directed accounts accordingly. The decision involves important considerations as to the effect on judgments under Pigot's Act of the Statutes of Limitations, 3 & 4 Wm 4, c. 27, and 37 & 38 Vict. c. 57, and the remedies open to such judgment creditors in Ireland. His Honor was of opinion that a judgment creditor under

Appeal. 1892.

SHEA v. MOORE.

Walker, C.

Pigot's Act is for all purposes of right and remedy on the same footing as an equitable mortgagee, and that sections 2 and 3 and 24 of the Act of 1833 applied to his case, as regards the right to recover the money, as well as the 40th section, modified as to time by the Act of 1874 : in other words, that he had a right to bring an action for the recovery of the land charged, which an action of foreclosure is, as well as a right to bring an action or suit to recover the money secured by the judgment.

That a mortgagee, whether legal or equitable, is in the position the Master of the Rolls placed this judgment creditor is clear, and though the authority of *Hugill* v. *Wilkinson* (1) was questioned before us, I think it is the logical corollary of *Heath* v. *Pugh* (2).

But underlying the whole of the Master of the Rolls' judgment is the question whether a judgment creditor under Pigot's Act does fill for all purposes the position of an equitable mortgagee, not only to the extent of having a specific charge on the estate, but also of having, in the contemplation of equity, the estate of the debtor vested in him, subject to redemption, so that he could maintain a foreclosure action for the recovery of the land. It is not enough that Pigot's Act should create a charge, for every charge is not an equitable mortgage, though every equitable morgage is a charge.

There are many securities on land (even involving a right to redeem) which have been held not to give the right to foreclose, *e. g.* the securities on land mentioned in *Sampson* v. *Pattison* (3) and *Scweitzer* v. *Mayhew* (4). But Mr. Carson rightly argued this point as a question of construction on Pigot's Act.

It is true that a judgment under Pigot's Act obtains part of the character of an equitable mortgage, viz. that it is made a charge on land founded on an imputed agreement of the debtor to make it so, but I see no reason to think that it becomes more than what the Act calls it—a charge. The history of the law shows very clearly what was intended by the Act. The relation of a judgment to the freehold estate of the debtor before Pigot's Act is well known. The remedy by *elegit* was limited. The judgment itself was what has been called an incumbrance on the land—a potential lien—a general charge. It certainly was not what

(1) 38 Ch. Div. 480.
(2) 7 App. Cas. 235.
(3) 1 Hare, 533.
(4) 31 Beav. 37.

the 22nd section makes it, a specific charge upon all lands of the debtor from its entry. [His Lordship read the preamble, and sections 19 and 22 of the Act.] Suppose A says in writing, signed by him :—"I agree that all my lands shall stand charged in favour of B, with £1000 and interest," what is there in the language to create a mortgage? You have a specific incumbrance or lien opposed to a general lien, or general charge—a charge deemed to be perfected, but still no more than a charge. No doubt passages are to be found in the judgments in *Rolleston* v. *Morton* (1), *Baldwin* v. *Belcher* (2), *Ex parte Boyle* (3), in which language is used consistent with the judgment having the character of an equitable mortgage, but in no one of them was it necessary to consider whether the judgment had attached to it the character or remedies of an equitable mortgage. Its being a specific lien was enough for the cases in question. But if under Pigot's Act all the estate of the debtor was equitably vested in the judgment creditor, subject to redemption, whence the necessity of 13 & 14 Vict. c. 29? It recites Pigot's Act. [His Lordship read section 7.] It removes any possible doubt on the construction of Pigot's Act.

The practice as to the form of the decree in England does not much aid. That of a foreclosure will be found in *Ford* v. *Wastell* (4); *Jones* v. *Bailey* (5), which was stated to be the right form: *Messer* v. *Boyle* (6); *Thornton* v. *Finch* (7), and in the decree of Hall, V.-C., in *Beckett* v. *Buckley* (8), which was assumed to be the ordinary decree. The form of order for sale will be found given in *Footner* v. *Sturgis* (9); *Simpson* v. *Morley* (10); *Smith* v. *Hurst* (11). The question had no practical importance till, at all events, *Heath* v. *Pugh* (12) was decided. But can any research find a decree in Ireland giving the right of foreclosure to a judgment creditor? and we have more reasons to refer to Irish practice than English on the question how far the right is to be ascertained from the common form of decrees; and, I may ask, where is the forfeiture

(1) 1 Dr. & War. 195.
(2) 6 Ir. Eq. R. 424.
(3) 3 De G. M. & G. 515.
(4) 6 Hare, 229.
(5) 17 Beav. 582.
(6) 21 Beav. 559.
(7) 4 Giff. 518.
(8) L. R. 17 Eq. 435.
(9) 5 De G. & S. 736.
(10) 2 K. & J. 71.
(11) 10 Hare, 30.
(12) 7 App. Cas. 235.

Appeal. 1892.

SHEA v. MOORE.

Walker, C.

which precedes and founds the foreclosure? I think a judgment under Pigot's Act is governed by the 40th section, not by the 2nd, 3rd, and 24th sections with the 40th; and that the statute of limitations had run on 29th September, 1877. Passing from that branch of the case, I rather infer from the judgment of the Master of the Rolls, that if he were of the same opinion as we are, he would have held the plaintiffs entitled, without giving the trustee the credits claimed. But Mr. Carson and Mr. Samuels here for the defendant contended that though the judgments were barred in 1877, still F. W. Moore was rightly in possession, had received the rents, and was entitled to apply them to principal and interest, and thus revive the judgments, and further, that the legal estate could not be taken from him till all principal and interest were satisfied. I do not myself intend to express any opinion on the point what the extent of the rights of the defendant might be if the judgments were not barred in 1877. The way this part of the case was presented was mainly as follows :—The plaintiffs have no title save through William H. Moore.—Though the statute of limitations had run in 1877, it was only the remedy was barred and not the right.—The trustee was rightly in possession, and it was said he undoubtedly received the rents, and applied them to his own purposes.—The moneys are in his hands applied to his incumbrance, and this is a suit to take them from him, like the case of the proceeds of an estate sold by the mortgagee under a power of sale, on the authority of *Edmunds* v. *Waugh* (1), and *Marshfield's Case* (2).—And it was further argued that his receipt and application of the rents were sufficient to revive the barred debts upon the authority of the cases of *Harty* v. *Davis* (3), and *Toft* v. *Stephenson* (4), and though he was trustee, his position was likened to the case of an executor who is at liberty to retain for a debt of his own barred by the statute.

Now, in the first place, all this is a complete ignoring of the facts, and the character in which the trustee was acting. He entered as trustee, and received the rents under the trust for himself as *cestui que trust*, and under the mistaken belief he was such. The judgments he sets up were vested in the trustees of

(1) L. R. 1 Eq. 418.
(2) 34 Ch. Div. 721.
(3) 13 Ir. L. R. 23.
(4) 1 De G. M. & G. 28.

the settlement of 1851, and they were transferred to the new trustees of that deed by the new appointment of 1883, and the position he now takes up is one assumed for the first time in February, 1891.

It is quite clear that when a payment is made, or acknowledgment given by a person who fills two characters, the Court will ascertain the character in which it was made in fact. In *Fordham* v. *Wallis* (1) it was held that an acknowledgment of a debt by payment of interest, when made by a party filling the two characters of beneficial devisee and executor, will be attributed to both characters, and not to one only, for the moral obligation does not attach more to one character than the other. But it is otherwise when the characters held by the party are entirely distinct, as when he is personally liable as debtor, and is answerable also in the character of executor or trustee of another, for he then represents two persons, and the question in such a case is, by whom the promise is made and not what is its extent or effect.

That the payment of interest of a debt of the testator by his executors, they being also trustees of his real estate, *not subject by the will to debts*, did not necessarily keep the debt alive against such real estate is clear, for although the executors and trustees were the same persons they filled different characters, and when the payment was made by them in the character of executors only, the real estate was not affected by it. The cases of *Harty* v. *Davis* (2) and *Toft* v. *Stephenson* (3) are decisions of the highest authority, but the limits of their application are well defined by Sir Edward Sullivan in *Becher* v. *Delacour* (4), where the attempt was to treat a charge revived through a payment by a tenant for life of the lands after the debt was barred. A tenant for life represents the estate, but only consistently with his position as regards the inheritance, and *Harty* v. *Davis* (2) and *Toft* v. *Stephenson* (3) are there put upon the ground that the payments were made by absolute owners, for such in effect the trustees in *Toft* v. *Stephenson* (3) were, being devisees in trust for payment of debts.

In *Edmunds* v. *Waugh* (5) and *Marshfield's Case* (6) the fund

(1) 10 Hare, 217.
(2) 13 Ir. L. R. 23.
(3) 1 DeG. M. & G. 28.
(4) 11 L. R. Ir. 187.
(5) L. R. 1 Eq. 418.
(6) 34 Ch. Div. 721.

Appeal. 1892. SHEA v. MOORE. Walker, C.

was in the hands of the mortgagee in that character. He was not suing for its recovery by either action or suit, and he was not asserting any right inconsistent with his character. I do not think the cases of *Hill* v. *Walker* (1) and *Courtenay* v. *Williams* (2) establishing the executor's right of retainer and deduction for a barred debt, apply to the position of F. W. Moore either in law or fact. In *Atkinson* v. *Atkinson* (3), cited by Mr. Samuels, the trustee, in what he did, was acting under the trusts. But I think this part of the case rests upon the broad principle that F. W. Moore got into possession under the trust, and held the possession under it, and that he cannot now say, in answer to a suit to enforce the trusts, that his possession and receipt have operated to put upon the trust estate for his own benefit a liability which did not exist when he entered. It would enable him to assert, by virtue of his trust, a title in himself, paramount and adverse to that trust which he was bound not only to assert but to protect against unrecoverable debts of his own and others. The position he takes up now is one which this Court, looking to the conflict between his interest and duty, forbids him to assume. I need only refer to the cases cited of *Attorney-General* v. *Munro* (4) and *Hamilton* v. *Wright* (5) as illustrations of that principle, and it is curious that another authority cited, *Tennant* v. *Trenchard* (6), has a bearing upon both branches of the case before us. In that case Mrs. Tennant, by deed dated the 9th April, 1835, conveyed certain lands to Henry, Charles, and George Tennant, in trust for themselves and her three daughters (subject to a mortgage for £50,000), for their respective lives, with remainder to their children. The deed contained a provision that if any of the children should hold any bond or note, or other security for money advanced for the use of the settlor, then the party "should be entitled to *a charge by way of mortgage* on all the lands for the principal and interest next after the £50,000 as an addition to his or her beneficial interest. It also contained a proviso that if any child should pay off any part of the £50,000, he should be entitled to stand and be a mortgagee on the estate for the monies so paid, and interest. In 1839,

(1) 4 K. & J. 166.
(2) 3 Hare, 539.
(3) 1 B. & B. 238.
(4) 2 De G. & Sm. 163.
(5) 9 Cl. & Fin. 111.
(6) L. R. 4 Ch. App. 537.

Charles Tennant paid £7500 of the £50,000 mortgage, and in 1851 he bought for the trust estate the Compton Estate for £12,339, and he also made large advances to Margaret E. Tennant. In 1850, Margaret E. Tennant died, leaving property upon the same trusts as those of the trust deed, but charged with a mortgage for £8000 to one Davidson. In 1859 Charles Tennant filed a bill against the co-trustees and *cestui que trusts* for the administration of the estate, and from the accounts it appeared that there was due to him, in respect of money paid by him in discharge of the mortgage, £14,865; in respect of the purchase of the Compton Estate, £23,503; also further sums advanced to Margaret E. Tennant, £43,803. In 1867, Charles Tennant paid Davidson £8700 and took a transfer of his mortgage, and in February, 1867, Charles Tennant, who was both trustee and tenant for life of two-sevenths of the estate, filed a bill for an account and foreclosure. Giffard, V.-C., made a decree directing accounts and a sale upon certain terms, the decree to be without prejudice to the plaintiff's right to foreclose. It was held in the Court of Appeal—1, that it was a mere charge, carrying no right to foreclosure; and 2, that Charles Tennant, being a trustee, would not be allowed by a Court of Equity to foreclose. Lord Hatherley, in giving judgment, said:—"It has been argued with considerable force, having regard to the authorities, that if a person has a charge, the right to foreclose accrues. But although some of the authorities appear to conflict with each other, it seems on the whole to be settled that if there is a charge *simpliciter*, and not a mortgage, or an agreement for a mortgage, then the right of the parties having such a charge is a sale and not foreclosure. There is no magic in the mere words, and although they would be strong in the ordinary case of an instrument creating *simpliciter* a right to charge by way of mortgage, yet the whole character of the transaction must even then be looked at."

Later in his judgment he says:—"But the second point in the case appears to me to be conclusive upon the present contention. First of all, supposing that Mr. Charles Tennant had acquired a right, under certain circumstances, to call for a mortgage of this property, and that having, under those circumstances, the ordinary right of foreclosure while he was the senior managing

Appeal. 1892.

SHEA v. MOORE.

Walker, C.

trustee, with all the powers vested in him, he applied to this Court for foreclosure. Then he would be placed in a position which the Court invariably controls, of a person whose duty and interest are entirely conflicting." And then he says:—"This case must be put upon the broad principle, that the trustee is in a position in which it is impossible for him, if a foreclosure is granted, to make the performance of his duty coincide with his interest, and therefore this Court would be bound, even if this deed gave him the power of foreclosure, to say that it was impossible to allow him to foreclose when his duty was to take every possible step for the saving of the estate." That seems to me an authority on the question whether F. W. Moore, sole surviving trustee, who had got into and was in possession as trustee, should be allowed to foreclose on foot of his own barred judgment.

For these reasons we cannot agree with the Master of the Rolls on the first point, nor with the contention of the defendant on the second. We are of opinion that the plaintiffs are entitled to judgment for a reconveyance of the estate, without reference to any of the demands relied on in the defence, and the plaintiffs now at the bar waiving any account of rents prior to those received by Mr. Lambert under the order of the 1st March, 1892, the account will be so limited.

The defendant must pay the costs in the Court below and of this appeal.

PALLES, C.B.:—

I so entirely concur in the judgment of the Lord Chancellor, and in the reasons given for it, that I shall not refer to any of the questions argued except one, viz. whether the effect of the 22nd section of Pigot's Act (3 & 4 Vict. c. 105) is to give a judgment creditor the right of an equitable mortgagee to foreclose his security. Until the decision in *Heath* v. *Pugh* (1), the question was not one of practical importance in this country; but as that case establishes that a suit for foreclosure by an equitable mortgagee is

(1) 7 App. Cas. 235.

"an action for the recovery of land," within section 2 of the statute of limitations, upon it will depend the operation of that statute upon judgments, so far as they are charges upon land under 3 & 4 Vict. c. 105, sect. 22.

Section 2 deals with actions for the recovery of land which under sect. 1 is to be interpreted to include "any estate or interest in land." The subject-matter of sect. 40 is not the land itself, but charges on land; and I admit, in favour of the judgment creditor, that a charge on land is an interest in land; or, adopting the words of Lord St. Leonards in *Rolleston* v. *Morton* (1) that in a certain sense it is even "an estate in land." I am, however, of opinion that the "interest in land," or "estate in land," which a judgment creditor has under 3 & 4 Vict. c. 105 is something different from any "estate or interest in land" within sect. 2. Were it otherwise, sect. 2 and sect. 40 would have a common subject-matter; and there would be two different periods from which the statute would commence to run, as against the same single demand, in reference to the same subject-matter. In my opinion the "interest in land," which is within sect. 2, must be an estate capable of accurate definition, and not a mere unascertained portion of the interest in a larger estate, capable of being ascertained only by reference to a certain money value which was to be taken out of the proceeds of a sale, or out of the rents and profits. Take the two sections. Section 40 included, no doubt, a "mortgage," but it did so in its character of a charge on the land, and not as the land itself, and the draftsman overlooked the consideration, that so long as the estate by way of mortgage was not barred, the mortgagee in whom it was vested was entitled to hold it, notwithstanding that the charge, *quâ* charge, had been extinguished. That became apparent immediately after the passing of the Act, and the result was that there was a further Act (7 Wm. 4, and 1 Vict. c. 28) which recognised an estate by way of mortgage as being within sect. 2; and although the legislation did not actually take mortgages out of the 40th section of the Act, it so extended the period of limitation under sect. 2, in respect of an estate by way of mortgage, as

(1) 4 Ir. Eq. R. 149.

Appeal. 1892.

SHEA v. MOORE.

Palles, C B.

for practical purposes to make the period of limitation the same under both sections. I say "for practical purposes," because theoretically it did not, as the period prescribed by sect. 2 was subject to various extensions, enacted by sect. 3 and otherwise, as to which there were no corresponding provisions in 7 Wm. 4, and 1 Vict. c. 28. That Act necessarily led to the decision in *Heath* v. *Pugh* (1). There could be no question that an equity of redemption was an estate, nor that a suit to foreclose was in all strictness a suit to recover that equitable estate, as the decree therein barred the right of the debtor to recover that estate in equity, so that the two estates, the legal estate and the equitable estate, coalesced, and that which formerly was in contemplation of equity, a mere security for money, became, in equity as well as at law, the full ownership of the estate. The decision in *Heath* v. *Pugh* (1) also, as I think, applies to an equitable mortgagee, whether the agreement for a mortgage is express, or is implied from a deposit of title-deeds as security. Thus the question arises in this case whether the right of the judgment creditor under sect. 22 of Pigot's Act is in all respects the right of an equitable mortgagee. I refer in the first instance to the words of that section. It gives a charge not only upon "all the lands of which the judgment debtor was seised or possessed at law or in equity at the time of entering up the judgment," but also upon lands which the judgment debtor had not at that time, but to which he might become entitled at any future time; and it seems clear that the right which the judgment creditor acquired by the rendition of the judgment, as against that future acquired estate of the judgment debtor, could not with accuracy be described as "a right to bring an action for recovery of land." Within sect. 2, land, in that expression, must mean specific land, and the right to recover *that land* could not have arisen until the judgment debtor had acquired his estate in it. Thus the contention of the respondents apparently involves the conclusion that if a person against whom had been obtained a judgment, made a charge on land by 3 & 4 Vict. c. 105, at any time after the rendition of that judgment acquired a new estate in lands, the statute of limita-

(1) 7 App. Cas. 235.

tions in respect of that new estate should run, not from the rendition of the judgment, but from the time at which the new estate was acquired. That is a startling construction of a statute of limitations in reference to charges on land, which had for its object to give statutory effect to the presumption of fact which formerly was drawn from non-payment during a considerable period of time. Were this construction to prevail, the operation of the statute would be prevented by a matter which had no relation to the existence of the debt, to the payment of interest, or to acknowledgment, that is, by the accident whether the debtor should, at any time thereafter, acquire an estate in lands. Indeed the argument can be pushed further, because whatever may be the right of the judgment creditor in respect of his judgment, it must be one single right. He has not one right against personal estate and another right against real estate, each subject to a different statute of limitations: *Henry* v. *Smith* (1). The second result of the respondent's contention would be that this one right, so far as it affects realty, would be split up into as many different rights as there may be different estates acquired by the judgment debtor at different times, and as to each of them, would endure, unextinguished by the statute of limitations, to a different period. Such a result is one which the Court ought not to arrive at, unless compelled to do so by clear and unambiguous words.

Upon considering the difference between the positions of an equitable mortgagee and a judgment creditor, all difficulty disappears. The right of the former is derived from contract. The Court construes that contract; and wherever, from the words used, or from circumstances, such as a deposit of title-deeds, it construes that contract to be one to give, not merely a charge, but a charge by way of equitable mortgage, it gives effect to it and enforces it. But in the case of a judgment creditor there is no contract to construe. We have but to see what is the right which the statute has given him. He has that right, and nothing more. What does the statute give him? It, first, gives him a charge; and, secondly, it gives him "such and the same remedies in equity against the

(1) 1 Con. & Law. 511; 2 Dr. & War. 381.

Appeal. 1892.

SHEA v. MOORE.

Palles, C.B.

hereditaments so charged as he would be entitled to, in case the person against whom the judgment shall have been so entered up had power to charge the same hereditaments, and had by writing under his hand agreed to charge the same, with the amount of such judgment and interest thereon." "Agreed to charge the same." There can be no controversy that there were known to the law various classes of charges upon land, constituted by writing which were not by way of equitable mortgage. In truth, the argument for the respondent really involves the fallacy that because an equitable mortgage is a charge, therefore every charge is an equitable mortgage. Upon what argument can you suggest that, because you have the same rights as you would have had, had the sum been charged, therefore you have the rights as an equitable mortgagee? The essence of a charge by way of mortgage was that a period should be named at which, in the event of non-payment, there should be a forfeiture of the estate at law. The contract was to pay within a definite time, but equity, not deeming the time material, gave a further reasonable time for payment; but as it insisted upon the mortgagor losing the estate in case he did not then pay, within the further time so given, the necessary result was that the estate should be subject to foreclosure as well as to redemption. Again, equity, considering that which was agreed to be done had in fact been done, assumed, in the case of an agreement to mortgage, jurisdiction in the same way as if the agreement had been perfected by a legal mortgage; and instead of compelling the execution of a mortgage, which would have given a right of foreclosure, took the shorter course of directing that in the event of non-payment within the time it prescribed, there should be a conveyance of the legal estate by the equitable mortgagor to his mortgagee absolutely, and so worked out without the actual execution of a legal mortgage the same result as if it had been executed and a decree of foreclosure obtained. The judgment of Lord Hatherley, already referred to, supports this view. "It has been argued," he says, "with considerable force, having regard to the authorities, that if a person has a charge, the right to foreclosure accrues. But although some of the authorities appear to conflict with each other, it seems on the whole to be settled that if there is a charge *simpliciter*, and not a mortgage or

an agreement for a mortgage, then the right of the parties having such a charge is a sale, and not a foreclosure." I agree in that proposition. I hold that it rules this appeal. To prevent its application here we should read into the 22nd section the words "by way of mortgage," a construction for which there is no authority, and which, in my opinion, is against all principle.

I agree that the appeal ought to be allowed.

Fitz Gibbon and Barry, L.JJ., concurred.

Solicitor for the plaintiffs: *John O'Connor.*
Solicitor for the defendant: *Peter Lambert.*

R. D. M.

FISHER *v.* COAN.

(1893. No. 270.)

Specific performance—Sale under power in mortgage—Land Law (Ireland) Act, 1881, s. 1—Right of pre-emption.

The defendant, by an agreement dated the 7th February, 1893, contracted to sell to the plaintiff a farm of land, held under contract of tenancy from year to year at a judicial rent, of which he was mortgagee. The defendant failed to carry out the sale, and relied on the bankruptcy of the mortgagor and on the non-service on the landlord of notice under the Land Law (Ireland) Act, 1881, section 1, as a defence to the action for specific performance:—

Held, that the mortgage was not a sale within section 1 of the Land Law (Ireland) Act, and that the landlord had not a right of pre-emption.

Specific performance of the contract for sale decreed.

Trial of Action for specific performance of an agreement, dated the 7th February, 1893, whereby the defendant agreed to sell, and the plaintiff to purchase a farm of land, situate at Ballymorran, in the parish of Killinchy, barony of Dufferin, and county of Down, for £275. The premises were held by Bingham Calvert, as tenant from year to year, and by him mortgaged to the defendant by deed dated the 4th June, 1892. The said Bingham

V.-C. 1893.

FISHER v. COAN.

Calvert was adjudicated bankrupt on the 6th February, 1893. The defendant, under the power of sale in his mortgage, put up the premises for sale by public auction, but the bidding being insufficient the sale was not carried out. Subsequently the plaintiff, who had bid £265 at the auction, agreed to purchase the premises for £275, subject to the conditions of sale under which the premises were originally put up for sale, and paid £56 17*s.* 6*d.* deposit. There had been a spirit grocer's license attached to a house on the premises, which, under one of the conditions, was to be allowed to drop. The defence pleaded relied on the bankruptcy of the mortgagor.

Hume, for the plaintiff:—

The bankruptcy of the mortgagor is no answer to this action against the mortgagee on his contract. There is no evidence that this chattel interest ever vested in the assignees in bankruptcy. The defendant cannot rely on the condition that the license is to be dropped to avoid the contract. He seeks to rely on his own breach of trust, if it be a breach of trust. There is no evidence that the license was of any value. There is no evidence as to whether the landlord got notice of this sale or not, nor whether he was aware of the mortgage. If he had any right of pre-emption, his remedy was under sect. 1 of the Land Law (Ireland) Act, 1881, to move to have the sale set aside. Until he move the sale is valid, and his time for moving to set aside the sale is gone. It is only "when the just interest of the landlord so require" that a sale will be set aside: *Poole* v. *Prendergast* (1).

The case does not come within sect. 1 of the Land Act of 1881. The mortgage is not a sale, but a charge: *Kelly* v. *Enright* (2); *Beauclerk* v. *Hanna* (3). In *Farrelly* v. *Waller* (4) the specified value had been fixed. The bankruptcy of the tenant is not a breach of statutory conditions, except where the estate of the bankrupt has vested in his assignees. There is no evidence here that the assignees have elected to take the tenancy, or that it

(1) 24 Ir. L. T. R. 12.
(2) 11 L. R. Ir. 379.
(3) 23 L. R. Ir. 144.
(4) 28 L. R. Ir. 122.

vested in them: Cherry and Wakeley, p. 223, note *(i)*. Even if there has been a breach of statutory conditions the landlord's remedy is by ejectment, founded on notice to quit.

Payment of damages may be ordered by the Court if specific performance cannot be carried out.

Craig, Q.C., for the defendant:—

Specific performance of this agreement will not be enforced. It is an attempt to compel the defendant to do an act which he cannot lawfully do: *Harnett* v. *Yielding* (1); *Jenkins* v. *Jones* (2); *Parkinson* v. *Hanbury* (3). The sale which destroys the license is a breach of trust, and is void against the creditors of the bankrupt. No notice of intention to sell was served on the landlord, and no legal interest could be conveyed to the purchaser: *Farrelly* v. *Waller* (4). Specific performance could not be carried out. The person having the legal estate is not before the Court, and the suit is consequently defective. All that the defendant could convey is a statutory tenancy, subject to be destroyed because of the breach of the statutory condition by the tenant's bankruptcy. To sell under conditions which destroy portion of the property, namely, the license, is a breach of trust which will not be enforced.

THE VICE-CHANCELLOR:—

There have been several grounds of defence to this action put forward, some of which are for the first time raised in argument. The first defence relied on is that the defendant was a party to a fraud on his creditors by consenting to a sale, one of the conditions of which was that a spirit grocer's licence, which had been attached to a house on this farm, was to be allowed to drop. The facts appear to be that the premises were first put up for sale with the spirit license, and that the landlord refused to consent to a sale except on condition that the license should be dropped. The property was then set up a second time, subject to an express condition, by which the purchaser bound himself not to apply

(1) 2 Sch. & Lef. 549.
(2) 2 Giff. 99, at p. 108.
(3) 1 Dr. & Sm. 143.
(4) 28 L. R. Ir. 122.

V.-C. 1893.

FISHER v. COAN.

for a renewal of the license. This was not a fraud upon the creditors.

The second ground of defence put forward is that the mortgage was a sale within sect. 1 of the Land Act of 1881, and was therefore inoperative because notice of the tenant's intention to execute it was not given to the landlord. In my opinion the language and provisions of that section apply only to sales properly so called, and do not apply to mortgages or other charges by the tenant of his tenancy. It would, I think, be highly inconvenient to construe the section as operating in every case of a charge by the tenant on his interest, no matter of what nature or amount, to give the landlord a right of pre-emption of what was not intended to be sold, but only to be mortgaged or otherwise charged. In the absence of express authority to the contrary, I hold that this was not a sale within sect. 1 of the Land Law (Ireland) Act, 1881. The section does not make even an actual sale of the tenancy void by reason of failure by the tenant to give the landlord notice of his intention to sell, but renders it voidable by the Court, if it think fit, and that the just interests of the landlord so require.

Thirdly, it is said that the landlord's consent was not given to this sale, and that the tenant's bankruptcy is a breach of a statutory condition. In the first place, this objection can be obviated by obtaining the consent of the landlord to accept the plaintiff as tenant, which it is said he is willing to give, and even if such consent cannot be obtained, still the plaintiff would be entitled to a decree for specific performance, and an enquiry as to damages. The plaintiff must either accept the title, or there must be an enquiry whether a good title has been shown, and when. If good title is shown there must be an enquiry as to what damages the plaintiff is entitled to by reason of delay, and if title is not shown the usual enquiry as to damages. There is a clear contract, not disputed, which is evidenced in writing, and if the defendant is not able to fulfil it he must abide the consequences.

Solicitor for the plaintiff: *M. H. Turnbull.*

Solicitor for the defendant: *J. J. Brown.*

T. H. M.

IN RE SIMON C. GAVACAN (1).

Bankruptcy.
1893.
Oct. 17.

Practice—Depositions—Admissibility against third party.

Where property in the possession of the assignees was claimed by a third party:—

Held, that depositions exclusively relating to the question of the property and signed by the witnesses were admissible in evidence against the claimant, where the claimant had notice of the examination of the witnesses, and was served with notice of the assignees' intention to use the depositions upon the hearing of the claim.

In re Brünner (19 Q. B. Div. 572) distinguished.

MOTION on behalf of Mrs. Mary J. Gavacan, for an order that the official assignee be directed to retire from possession of, and deliver up to, the said Mrs. Mary J. Gavacan, the household furniture and all other removable chattels, save some books and a gasalier, in and about the house and premises, Mayfield, North Circular-road, together with the Ralli cart, horse and harness. An affidavit in support of the motion was made by Mrs. Gavacan. The assignees served notice that on the hearing of the motion they would rely *inter alia* upon the depositions of the bankrupt, Thomas Doyle and Joseph Spring, taken on the 10th and 13th October, inst. These depositions related exclusively to the property in the goods claimed by Mrs. Gavacan. Mrs. Gavacan had notice of this examination. The witnesses signed their depositions.

Carton, Q.C., for Mrs. Gavacan, objected to the depositions being used, and relied on *In re Brünner* (2); *Ex parte Chambers* (3); *Ex parte Rees* (4).

Houston, Q.C., for the assignees:—

In *In re Brünner* (2) Cave, J., was considering the admissibility of the public examination of the bankrupt. He referred to the case

(1) Before BOYD, J.
(2) 19 Q. B. Div. 572.
(3) 1 Deac. 223; 2 M. & A. 466.
(4) De Gex, 208.

Bankruptcy. 1893. *In re* GAVACAN.

of an examination taken for a different purpose being used to raise a *prima facie* case against a third party who was not a party to the proceeding in which the examination was taken, and had not any notice that the depositions were going to be used against him. In *Ex parte Hall, In re Cooper* (1) it was held that a deposition taken in bankruptcy for one purpose, and filed, may be used against the witness as an admission in any other proceedings in the matter of the same bankruptcy. In *Ex parte Bignold* (2) a similar deposition was only excluded on the ground that notice had not been served on the party to be affected thereby. To the same effect is *Ex parte Wilkes, In re Tarrant* (3).

BOYD, J., held that the case was distinguishable from *In re Brünner* (4), and allowed the depositions to be used.

Solicitor for Mrs Gavacan: *William Ryan.*
Solicitors for the assignees: *Larkin & Co.*

W. G.

(1) 19 Ch. Div. 580.
(2) 1 Deac. 727.
(3) 2 Deac. 1.
(4) 19 Q. B. Div. 572.

THE ATTORNEY-GENERAL (AT THE RELATION OF THE REV. J. JOHNSTON) *v.* THE DRAPERS' COMPANY AND OTHERS (1).

Appeal. 1893. Jan. 25, 26.

(1892. No. 496.)

Practice—Service of writ out of the jurisdiction—Gen. Ord. XI., R. S. C. (Ireland), 1891—Jurisdiction.

The defendants had their offices in London, and the writ in the action claimed:—

1. A declaration that the defendants were trustees of certain lands in the county of Londonderry for the general objects of the Plantation of Ulster, and that a scheme should be settled for the application of the rents;

2. A declaration that the defendant Companies, in so far as they had sold portion of the estates conveyed to them by the Irish Society, had committed a breach of trust by such sale; and

3. An inquiry as to how the defendants had disposed of the woods of G. and K.:—

Held (affirming the decision of Porter, M.R.), that the case came within sub-section *b* of Gen. Ord. XI. of R. S. C. (Ireland), 1891, and that service of the writ out of the jurisdiction should be allowed.

Held, by Fitz Gibbon, L.J., that the case also came within sub-section *d*.

THIS was an action brought by the Attorney-General, at the relation of the Rev. John Johnston, Presbyterian Minister of Killaloe, in the county of Londonderry, against the Drapers' Company, the Tallow Chandlers' Company, the Skinners' Company, the Stationers' Company, the White Bakers' Company, the Girdlers' Company, the Salters' Company, the Dyers' Company, the Saddlers' Company, the Cutlers' Company, the Joiners', Ceilers', and Carvers' Company, and the Woolmen's Company.

The plaintiff's claim was for a declaration that the defendant Companies are trustees of certain lands and premises in the county of Londonderry, for the public and general objects of the Plantation of Ulster, and that the said objects still remaining to be provided for may be ascertained and declared, and a

(1) Before PALLES, C.B., and FITZ GIBBON and BARRY, L.JJ.

Appeal. 1893. ATTY.-GEN. *v.* DRAPERS' CO.

proper scheme settled for the due application for the future of the income of the said estates, and that the defendants may be ordered to apply the said lands, and the rents and profits thereof, upon and for the objects of the Plantation of Ulster:

That it may be declared that the defendant Companies, in so far as they have sold portion of the estates, conveyed to them by the Irish Society, committed a breach of trust by such sale, and that the said Companies may be ordered to account for the respective purchase-moneys received by them on such sales, and that the plaintiff may have against the defendant Companies, in respect of the said moneys, the same relief as is claimed in respect of the unsold estates, and that the said purchase-moneys may be applied under such scheme as may be settled upon and for the objects of the Plantation of Ulster:

That an inquiry may be had as to how the defendants or any of them, have disposed of the woods of Glenkonkeine and Killetra, and if it be found that the said defendants, or any of them, have improperly disposed the same, that the said defendant or defendants so found guilty of a breach of trust, may be decreed to account for such breach, and that an enquiry be had of all moneys received by such defendants or any of them, and that such defendants may account for such moneys as may be found to have been misapplied:

That the defendants may be decreed to account for all the rents and profits, income, dividends, and interest received by them respectively out of the said lands, hereditaments, and premises.

On the 9th June, 1892, an order was made by the Master of the Rolls for liberty to issue the writ, and serve it on the defendants in London, where the offices of all the defendants were, they being incorporated by English charters, and having all their documents in London.

The Drapers' Company, the Salters' Company, and the Skinners' Company, were three of the original principal Companies, among whom the Irish Society had divided portion of their lands at the time of the Plantation of Ulster. The other defendants were associated with those three Companies, but the action was discontinued against the Tallow Chandlers' Company, the Stationers' Company, the White Bakers' Company, the Dyers'

Company, the Saddlers' Company, and the Woolmen. On the 9th November, the Drapers' Company, the Skinners' Company, the Girdlers' Company, the Salters' Company, the Cutlers' Company, and the Joiners' Company applied to the Master of the Rolls for an order that the order of the 9th June, 1892, might be discharged and that the service on the defendants might be set aside, on the ground that, having regard to the amounts and values of the several properties affected by the action, the greater portion of which was situate in England, it would be more convenient to have the questions involved in the action tried in England, and on the further ground that the relief claimed by the writ of summons was not confined to lands and hereditaments within the jurisdiction, but extends to other property not coming within Order XI. Rule 1. Affidavits were filed on behalf of the Drapers' Company, the Salters' Company, and the Skinners' Company, to prove that the greater portion of the lands which they held had been sold or were under agreement for sale. The Drapers' Company stated that about one-twentieth in value of their lands remained unsold, the Skinners' Company stated that about one-sixth of their lands were unsold, and the Salters' Company about one-hundreth of theirs. It appeared that portion of the estates had been sold to the tenants under the Purchase of Land (Ireland) Act, 1885, and the guarantee deposits would become payable to the vendors in 1905 and 1907.

On the 9th December, 1892, the Master of the Rolls made an order refusing the application (1).

From that order the defendants appealed.

(1) The following judgment was delivered by THE MASTER OF THE ROLLS:—

In this case two questions arise for decision. The first is one of jurisdiction as to the power of the Court to make an order for service of the writ in England; and the second, whether the balance of convenience is such that the order ought to be granted.

The present defendants are six of the London Companies; and it does appear that a very large portion of the property which had at one time been theirs, and which they derived from the Irish Society, has been sold and disposed of, and the purchase-money has, I presume, been taken over to England, where the defendants have their offices and headquarters, and where they may be considered, so far as companies can be, as "domiciled," but there still is in the case of the six Companies in question property belonging to them within

Appeal. 1893. ATTY.-GEN. *v.* DRAPERS' CO.

Serjeant Jellett, Q.C., The Right Hon. J. Atkinson, Q.C., and *Charles O'Connor*, for the appellants:—

The action seeks for two things—(1) to attach a trust on the lands, and (2) to follow the trust funds into our hands.

One of the objects of the Judicature Act was to assimilate the practice on both sides of the hall; it is necessary, therefore, to see what the practice was as to service of writs out of the jurisdiction prior to the Judicature Act. Before the 2 & 3 Wm. 4, c. 33, there was no power to serve a writ out of the jurisdiction, but by that Act power was given in the case of lands situate in Ireland to

the jurisdiction of this Court. That portion of their property is not large in proportion to the whole amount of what they originally had here, yet it is not what can be called an altogether unsubstantial amount. For instance, there is £185 ground rent annually payable out of land; and this is not the whole estate that the Salters' Company are now entitled to in this country, for there are some other portions stated to be only under agreement for sale. As regards the Drapers' Company, there is at present a tract of nearly 800 acres belonging to them within the jurisdiction unsold, and as regards the Skinners' Company they have also some property within the jurisdiction—parts of 10 townlands. The exact amount of acreage or exact rent is not before me. This is not a question of substitution of service. The Companies have not actually cleared out of the country. Some of their property is still here, and remains unsold. That is the way the matter stands as regards the question of jurisdiction.

I quite agree with the argument that Order XI. of the Judicature Rules of 1891 must be taken as embracing all cases in which the Court has power to direct service of a writ out of the jurisdiction. It is conclusively established that Order X. of the Rules under the Judicature Act of 1877 was exhaustive in dealing with every case where leave could be granted, and it seems to follow that Rule XI., which is now substituted for it, must be similarly exhaustive. Apart from any decision, I am clearly of opinion, on the form of the Rule, that it was intended to be complete, and must be looked upon as containing a codification of the cases in which the Court has power to direct service out of the jurisdiction.

The first question arises as to sub-section (*a*) of Order XI., which deals with a case where the whole of the subject-matter of an action is land within the jurisdiction, which *prima facie* applies, for instance, to such a case as an action of trespass, or an action in the nature of an ejectment, in which the land in question is all subject to the jurisdiction. That is not the present case. Indeed it was hardly contended that it is. The whole subject-matter in this case, in the first place, does not consist of land within the jurisdiction, but rather of alleged trusts affecting land and the proceeds of land, and a

effect service out of the jurisdiction. By the subsequent statute, 4 & 5 Wm. 4, c. 82, that power was extended to the case of charges, liens, or incumbrances on lands, or to suits concerning money in Government or other stock, or shares in public companies. That was the entire jurisdiction of Courts of Equity. The Courts of Common Law had not any similar power, but by the Common Law Procedure Act of 1853 there was conferred a power to substitute service of a writ on an agent within the jurisdiction, though not to serve a writ out of the jurisdiction; and that power continued down to the passing of the Judicature Act. By Gen.

portion of it is money outside the jurisdiction. Therefore the action does not merely deal with the land itself. In fact, the land has not all been retained in possession of the defendants, and this action is not for the purpose of obtaining possession of the land or asserting title to it, but for the purpose of impressing a trust on the profits arising from land and money representing land, for the benefit of the inhabitants of the county Londonderry, or part of it. This application, therefore, does not come within the terms of sub-section (*a*).

Then the question really turns upon whether it is within the following sub-sections, (*b*) or (*d*); for as regards the other sub-sections, (*c*) cannot apply because, amongst other reasons, this is not relief "sought against any person domiciled or ordinarily resident within the jurisdiction," and consequently this case must come within (*b*) or (*d*), or both of them; for admittedly none of the succeeding sub-sections apply.

As regards sub-section (*b*) the words are "any act, deed, will, contract," none of which terms apply to this subject-matter; "obligation or liability affecting lands or hereditaments situate within the jurisdiction is sought to be construed, rectified, set aside, or enforced in the action."

Now, if the lands which still remain in the possession of the defendants, and have not been sold, constituted the whole of the cause of action, the action would be plainly within this clause; because, assuming the plaintiff's case to be true, there would be a liability affecting lands "situate within the jurisdiction," which liability is sought to be enforced in the action. If the lands had not been sold this case would come clearly within the language of the sub-section; and as to the lands which have been sold, though I do not think they can be held to be within the jurisdiction, still on the grounds that as some of the lands are still within the jurisdiction—how much I do not know—and as the action is brought for the purpose of enforcing a trust affecting these lands, I am of opinion that the case does come within sub-section (*b*).

I have said during the argument that there is a very much larger quantity of land within the jurisdiction belonging to the defendants than actually

Appeal. 1893. ATTY.-GEN. *v.* DRAPERS' CO.

Ord. XXX., under the Chancery Act of 1867, where a defendant was out of the jurisdiction, the Court might order a copy of the bill to be served on him in such place. That order was copied from the corresponding English Order, under the Act of 1852: Cons. Ord. X., R. 7. In *Cookney* v. *Anderson* (1), Lord Westbury held that that applied only to cases which came within 2 & 3 Wm. 4, c. 33, and that it would be *ultra vires* to extend it further: *Foley* v. *Maillardet* (2) is to the same effect. These cases were overruled in *Drummond* v. *Drummond* (3).

Then came the Judicature Act, and Gen. Ord. X. allowed service

appears from the affidavit filed on behalf of the plaintiff, because the affidavits for the defendants show that there is a considerable and unascertained portion of land remaining undisposed of. It is stated that there is land "under agreement for sale," from which I gather that there has been an agreement entered into with reference to it—an agreement, either incomplete, in which case the land is still within the jurisdiction, or a completed agreement, which, if it has the effect of converting the land into money, would still leave the purchase-money available here, and therefore would be money (representing land) within the jurisdiction; and there may be a very great deal more land, or money representing land, than would be represented by the ratio of one-sixth or one-twentieth part, as mentioned in the affidavits, because that calculation excludes everything in reference to which there had been an agreement for sale entered into. It is another question whether the order for service out of the jurisdiction should be confined to a claim dealing with land, or money representing land, actually within the jurisdiction. I do not take the fact of there being a guarantee deposit remaining in the Land Commission much into account, because the guarantee deposit could not be made available for a long time, although I do not think that this circumstance should be wholly left out of consideration. But as regards the question of jurisdiction to make this order, does it arise within sub-section (*d*)? It may be that the case is also within this sub-section, though, as far as I can see at present, it is not. The action may not be brought for the purpose of carrying into effect "the trusts of any written instrument of which the person to be served is a trustee." It may not be for the purpose of enforcing an express trust (as distinguished from a constructive trust), arising on a written instrument within the meaning of the sub-section, though the plaintiff's counsel say that it really is; but it has been rightly contended by Mr. Brown, on behalf of the plaintiff, that it is not necessary for him to bring the case within more than one of the clauses of the section, and that it is quite sufficient to rest his case on the ground that it

(1) 1 De G. J. & S. 365. (2) *Ibid.* 389. (3) L. R. 2 Ch. 32.

of a writ out of the jurisdiction "whenever the whole or any part of the subject-matter of the action is land or stock or other property situate within the jurisdiction." That was found to be too wide in its terms, and accordingly Gen. Ord. XI., of the rules of 1891 was substituted for it; but it leaves out the words "or any part of the subject-matter is land or stock."

The first case then, where service is allowed out of the jurisdiction, is whenever the whole subject-matter of the suit is land within the jurisdiction. That is not the case here. By the 2nd paragraph of the writ relief is claimed in respect of a breach of trust, in having

comes within sub-section (*b*). I think, therefore, I am entitled to make this order, if otherwise it is a proper one to make.

And in considering the question whether, under the circumstances, the order ought to be made, I must take into consideration the matters pointed out in the 2nd section of this Order XI., viz. "having regard to the nature and value of the property affected, and of the comparative cost and convenience" of proceedings here and in England. On this question of convenience I have no doubt whatever that the matter should be decided here rather than in England. I do not say that there may not be some inconvenience in consequence of the adoption of this course. There will be inconvenience in any case. It would, no doubt, be inconvenient for the London Companies to be compelled to bring their books over to Ireland; on the other hand, it would be a matter of very great inconvenience for the plaintiff, if his case is right, to have to go to London for the purpose of proving his claim, for I do not think this plaintiff's case necessarily depends upon throwing down a charter, because, as far as I can see, it may involve consideration of circumstances and facts extending over a considerable time, and dealing with the actual management of the property in question; and so I think there is convenience to be considered both ways. And I cannot lose sight of the fact that I have already in this Court another action in which the very same question which arises in this case must necessarily be decided, and to which the Irish Society, and many of the principal London Companies, are actually parties. I do not consider it would be a fair ground for deciding this question of convenience, that the same solicitor, which is an accidental circumstance, appears for the defendants in both actions, and for all the Companies now before me; but it appears to me that the balance of convenience is in favour of the plaintiff. A large public question is involved, in the determination of which the present applicants are interested, but only as some of a number.

Then, having regard also to the fact that if a scheme in reference to this property had to be settled, it could more properly and effectually be settled here, and more effectively enforced in this country than in England, for

Appeal. 1893. ATTY.-GEN. *v.* DRAPERS' CO.

sold lands, and accounts are sought of the purchase-moneys. Then comes sub-sect. (*b*) :—"Any act, deed, will, contract, obligation, or liability affecting land or hereditaments situate within the jurisdiction is sought to be construed, rectified, set aside, or enforced in the action." This case does not come within that sub-section. Substitution of service of a writ on an agent within the jurisdiction will only be granted in those cases in which service out of the jurisdiction may be allowed : *Re Eagar* (1) ; *Whaley* v. *Busfield* (2) ; *O'Connor* v. *Star Newspaper Company* (3). The case is not within sub-sect. (*a*), because the whole subject-matter is not land, nor within (*c*), because the defendants are not ordinarily resident

instance, it might involve the appointment of a receiver, and the English Courts would not have jurisdiction in that way to give effect to a scheme dealing with Irish land, the balance of convenience is in favour of allowing the case to go on here. Then I am met with the objection of the difficulty of enforcing the order if it is made with regard to the property in England. But whether the decree is made or not, I must look at it for the present, on the assumption that the plaintiff has a case fit to be decided by the Court. I assume, as I must for the purposes of argument, that the plaintiff has a case, though, of course, I have no opinion on that matter one way or the other. The objection would exist in a still greater degree, if the case should be tried in the English jurisdiction, as regards the settlement of a scheme dealing with property in Ireland. Take an ordinary case. Suppose an action brought against a sole defendant, an individual, and not a corporation, and it is shown that he is a trustee holding landed property in this country, which he is, in breach of trust, selling off by degrees, and converting into money, a portion, even the main portion, of which he is successful in carrying out of the jurisdiction. If there is still a portion of the property within the jurisdiction, and an application is made for the purpose of having a writ served on him in England, charging him with a breach of trust, it would seem a proper case to have decided here, and that the order should be granted. That is the very case before me, except —and it is unnecessary to say it—that there is here no question of intentional misconduct or fraud. But so far as the administration of property is concerned, and looking at it in this light, it appears to be an ordinary case. For the defendants have simply one interest, and, though corporations, their position is the same as that of an individual who is the defendant in an action to restrain him as trustee, and to enforce rights against the purchase-money of lands he has sold in this country, and this would be eminently a case for decision here.

(1) 22 Ch. Div. 86. (2) 32 Ch. Div. 123, at pp. 123, 131. (3) 30 L. R. Ir. 1.

within the jurisdiction; unless, therefore, it is within (*b*) or (*d*), the plaintiff's case fails. We submit it is not within (*d*), because some of the property is not within the jurisdiction. The plaintiff cannot attract the jurisdiction, because a small part of the subject-matter is land within the jurisdiction: *Thomas* v. *Hamilton* (1). This action is not within sub-sect. (*b*) because a suit to be within that sub-sect. must be one in which the contract, obligation, or liability is sought to be enforced *so far only* as relates to land within the jurisdiction: *Agnew* v. *Usher* (2), *Kaye* v. *Sutherland* (3). Now here almost all the lands have been sold: the Drapers' Company have sold all their lands except about 1080 acres, and of that 782 acres

On these grounds, I think that the order for service of the writ out of the jurisdiction, which has already been made *ex parte*, should be allowed to stand.

Then Mr. Atkinson asks that the plaintiff should be compelled to enter into an undertaking to limit his claim for relief to that portion of the property in question which is actually within the jurisdiction. I do not think I can do that. In the case I have put of a trustee having money in his hands arising from the sale of property he has sold in Ireland, the claim against him cannot be limited to such portion as remains unsold within the jurisdiction, because the plaintiff who seeks relief against him would thus have to take a second proceeding in England, or France, or elsewhere for the purpose of enforcing the same rights against the balance of the property, though the whole thing arose in connection with an Irish estate. No doubt it might be an answer to the plaintiff's case to say, "The whole of the property, the whole of the money, has been taken to England." But as long as a portion of the subject-matter remains here I think jurisdiction exists to enable me to have the case tried here, and I think in the present instance this matter can be more conveniently determined in this Court, particularly having regard to the fact that there is already here another case involving the same question. The claim is one in respect of a trust alleged to attach to the tenure of lands in Ireland; and I think that if these defendants cannot be kept here, it would be better to say at once that the case is not in any part of it fit to be tried in our Courts than to say that part—the main part—is to be tried here, and the rest must be left to another action, on the same facts and the same law, in England.

I think, however, that this was a fair question to have brought forward, especially after what happened in the former case, and that therefore the costs of both parties should be costs in the cause.

R. W. L.

(1) 17 Q. B. Div. 592. (2) 14 Q. B. Div. 78. (3) 20 Q. B. Div. 147.

Appeal. 1893. ATTY.-GEN. v. DRAPERS' CO.

are under agreement for sale, leaving about 300 acres out of the entire estate unsold; the Skinners' Company have only one-sixth of their land unsold; and the Salters' Company only about one-hundredth. Again, we submit it is not within sub-sect. (*b*), as the subject-matter of this suit is not an "obligation or liability." It is obvious that that sub-sect. applies only to contracts.

J. Walker Craig, Q.C., and *W. H. Brown*, for the respondent:—

We submit that the case comes within sub-sects. (*b*) or (*d*). The execution of a trust falls within the scope of (*d*), and between those two sub-sections every case analogous to the present is included that could possibly arise. In *Société Générale de Paris* v. *Dreyfus* (1) the plaintiff brought himself within the jurisdiction by seeking for an injunction. In *Tassell* v. *Hallen* (2) there was a claim for damages joined with a claim to recover a plot of ground in Middlesex, and the latter claim brought the action within the jurisdiction. In *Lisbon-Berlyn Gold Fields Company* v. *Heddle* (3) a claim for an injunction attracted the jurisdiction.

The various endorsements on the writ in this case are not distinct causes of action, but are intimately connected. The sub-sections of Order XI. are to be read disjunctively; each is complete in itself and independent of the others: *Kaye* v. *Sutherland* (4).

Serjeant Jellett, in reply:—

Under the old practice the fact that assets consisted partly of stock, would not give jurisdiction to the Court to order service out of the jurisdiction in an administration suit: *Freeman* v. *Freeman* (5). The principle of the old practice still holds good.

The cause of action is not a liability affecting land within sub-sect. (*b*), nor is it land within sub-sect. (*a*). *Tassell* v. *Hallen* (2) does not apply. That was an ejectment with a claim for damages on a covenant which ran with the land. It was a case which plainly fell within sub-sects. (*a*) and (*b*). *The Société Générale de Paris* v.

(1) 29 Ch. Div. 239; on app., 37 Ch. Div. 215.
(2) [1892] 1 Q. B. 321.
(3) 52 L. T. (N. S.) 796.
(4) 20 Q. B. Div. 147.
(5) 4 Ir. Ch. R. 39.

Dreyfus (1) comes directly within sub-sect. (*d*). The fund was in the Court of Chancery, and an injunction was sought to protect it. It was personal property, within the jurisdiction of the Court. *Lisbon-Berlyn Gold Fields Company* v *Heddle* (2) was a different case. The defendant there was resident in Scotland, and he entered into a contract to perform certain services, but broke his contract. The plaintiff sought to rescind the contract, and for an injunction, and the case fell within (*f*) and (*g*).

Appeal. 1893.

ATTY.-GEN. v. DRAPERS' CO.

PALLES, C. B. :—

Jan. 26.

Two questions were argued before the Master of the Rolls: 1, whether the Court had jurisdiction to make the order appealed from; 2, if so, whether the case was one in which, in the exercise of his discretion, that jurisdiction should be exercised. The argument here has properly been confined to the first of these questions, viz. that of jurisdiction. That question depends upon the true construction of Order XI. It has been argued for the plaintiff that the case comes within two clauses of that order, viz. (*b*) and (*d*). The Master of the Rolls was of opinion that the case came within (*b*), but not within the other clause. I agree with his Honor that the case does come within clause (*b*); but for that reason I decline to express any opinion as to the application of clause (*d*), as that question does not, in my opinion, arise.

The claim endorsed on the writ is:—1, for a declaration that the defendant Companies are trustees of certain lands situate in the county of Londonderry for the public and general objects of the Plantation of Ulster; that such of those objects as still remain to be provided for may be ascertained and declared, and a proper scheme settled for the due application for the future of the income of the lands; and that the defendants may be ordered to apply the said lands and the rents and profits thereof upon and for the objects of the Plantation of Ulster. Had the relief sought stopped there, it is admitted that the Court would have had jurisdiction to make the order. The relief sought, however, goes further, and it is by reason of the additional relief so sought that the question to

(1) 29 Ch. Div. 239; on app., 37 Ch. Div. 215. (2) 52 L. T. (N. S.) 796.

Appeal.
1893.
ATTY.-GEN.
v.
DRAPERS' CO.
Palles, C.B.

be determined arises. That additional relief, omitting so much of it as is consequential merely, is, 2, that it may be declared that the defendant Companies, in so far as they have sold portion of the estates conveyed to them by the Irish Society (*i. e.* estates alleged to be bound by the trusts of the Plantation of Ulster), committed a breach of trust by such sales, and that the Companies may be ordered to account for the respective purchase-moneys received by them on such sales, and that the plaintiff may have against the defendant Companies, in respect of the said moneys, the same relief as is claimed in respect of the unsold estates, and that the purchase-moneys may be applied under such scheme as may be settled upon and for the objects of the Plantation of Ulster.

Now it is plain that had the estates referred to in the second paragraph remained vested in the defendant Companies, instead of having been sold by them, the Court would have had jurisdiction. Some, however, of those estates are alleged to have been sold, and the information does not seek to impose the trust upon them in the hands of purchasers; and, under such circumstances, the relief sought by paragraph 2 is apt and proper in a suit for the enforcement of the trust, in the sense that such a trust would not, prior to the Judicature Act, have been multifarious, and that the relief in question is part of the relief usually granted by a Court of Equity in respect of such a matter, and indeed is necessary to *complete* justice being done in the suit.

The argument for the defendants is twofold:—1, that upon the true construction of clause (*b*), a suit, to be within it, must be one in which the "contract, obligation, or liability," which is its subject-matter, is sought to be enforced *so far only* as relates to the land or hereditaments within the jurisdiction; 2, that a trust of land is not an "obligation or liability" within the order.

As to the first argument, the construction suggested imports by implication into clause (*b*) a limitation similar to that contained in clauses (*a*) and (*d*), in each of which it rests, not upon implication, but upon express words. To be within (*a*), the *whole* subject-matter of the action must be land within the jurisdiction. Under (*d*) the object of the suit is expressly limited to the execution (as to property situate within the jurisdiction) of the trusts of the in-

strument. Such a limitation is not expressed in, nor can it be implied from, the words of clause (*b*). To be within the clause, the only condition is that the "obligation or liability" shall affect land or hereditaments within the jurisdiction, but it will not the less affect them because it also affects other property. But further, suits to construe, set aside, or rectify deeds relating to lands within the jurisdiction are also within the clause. The argument relied on would therefore involve this, that in such a suit a deed which included property other than land could not be set aside or rectified as a whole, and that the construction adopted by the Court would be binding only as regards the realty in Ireland. There can be no implication which would involve such consequences.

I entirely agree with Serjeant Jellett, that in construing Order XI. we should have regard to the state of the law as it existed at the passing of our Judicature Act, to its history, and to a comparison of Order X. of our Rules of 1877 with our present Order XI. Such considerations, however, do not assist the appellants.

At common law there was no power to serve process out of the jurisdiction.

The statutable powers which existed at the passing of our Judicature Act were different in Chancery and in the Courts of Common Law; but as the present suit is one which formerly could have been instituted in Chancery only, it is unnecessary to refer to any statutes save those which related to that Court, viz. 2 & 3 Wm. 4, c. 33, and 4 & 5 Wm. 4, c. 82. The first of those Acts, by its 2nd section, authorised service in any part of the United Kingdom of process in "any suit . . . . in such Court concerning lands, or tenements, or hereditaments, situated in Ireland." By the second Act, 4 & 5 Wm. 4, c. 82, sect. 1, the provisions of the first Act were extended, and applied to all suits in that Court concerning, *inter alia*, "any charge, lien, judgment, or incumbrance theron," *i.e.* on lands, tenements, or hereditaments in Ireland; or concerning certain kinds of personal property, viz. money in any Government or other stock, or shares in public companies or concerns; and the provisions of the Act authorising service are, subject to certain conditions, extended to defendants resident out of the United Kingdom. It has never, as far as I

Appeal. 1893. ATTY.-GEN. *v.* DRAPERS' CO. Palles, C.B.

am aware, been contended that to be within the latter statute, 4 & 5 Wm. 4, c. 82, the relief sought by the suit should be confined to property within the jurisdiction; nor, having regard to the then rules and practice of the Court, would it have been possible to have so confined it. There were then two settled rules of practice, one of which prevented any undue extension of jurisdiction, and the other which rendered it essential in particular cases that suits within the statutes should embrace property other than that mentioned in it. On the one hand, the rule against multifariousness prevented anything foreign to the cause of suit within the statute of Wm. 4, being added on to the bill. On the other hand, the rule against multiplicity of suits prevented one single cause of suit being unduly split into several. Thus were there one charge on two properties, one of those properties being within the statute, say realty within the jurisdiction, the other personalty not within the statute, if in such a case the personalty were liable in the first instance in exoneration of the realty, or if both properties were *inter se* liable rateably to the charge, then the rules of the Court required the owners of both properties to be brought before it in the one suit, and if necessary both properties to be administered therein. If such a case were not within the statute, the circumstances might be such that the charge could not be realised either in this or in any other country. Serjeant Jellett has referred to *Freeman* v. *Freeman* (1), but my own experience of the former practice of the Court of Chancery was that that case was not acted upon in later years, and it certainly is inconsistent with the view of the statute taken by Lord Westbury, a Judge who, of all others, was least in favour of the extension of this jurisdiction. *Foley* v. *Maillardet* (2) was a suit by a legatee, against the sole legal personal representative in England of the testatrix, and such personal representative was permanently resident in Scotland. The bill alleged that she had in her possession parliamentary or other stocks and funds arising from the personal estate of the testatrix, and had also in her possession, or under her control, assets of her late husband, whose legal personal representative in England, and also in

(1) 4 Ir. Ch. R. 39. (2) 1 De G. J. & S. 389.

Scotland, the bill alleged her to be, and by whom jointly with the defendant the bill alleged the assets of the testatrix to have been from time to time received. The case came before Lord Westbury, upon appeal from a decision of Vice-Chancellor Stuart, who refused to allow an affidavit to be used to deny the statement as to the possession by the defendant of the parliamentary and other stocks and funds. The Lord Chancellor, interrupting counsel, observed :—"There are parliamentary stocks and funds in Scotland, and the allegations do not necessarily show the existence of such stocks or funds in England," showing that in his opinion the existence of such English stocks or funds would have brought the suit within the statute, although the relief in the suit should necessarily have extended to the assets in Scotland. So, too, in a suit to raise by sale the amount of a mortgage, the mortgagor being dead, it has always been the practice to bring his personal representative before the Court, and pray for the administration of his personal estate; and notwithstanding this relief, orders were made for service out of the jurisdiction.

By Order X. of the Rules of Court of December, 1877, under the Judicature Act, the cases in which this class of service was authorised were largely extended. It might be allowed whenever the whole or "*any part of*" the subject-matter of the action was "land, stock, or other property, situate within the jurisdiction, or any act, deed, will, or thing affecting such land, stock, or property." Experience showed that these words were too wide. They were large enough to embrace, for instance, an action of ejectment for two denominations of land, one of which was situated in Ireland and the other in England, although the writ of possession of the Irish Court could not run in England. The matter was, I believe, first brought under the notice of the English Lord Chancellor by the Scotch Judges; but however that may be, the Judges in Ireland were invited by the Lord Chancellor of England to re-consider our Order X. and settle it upon a basis more nearly approaching international comity. Accordingly, it will be found that each clause of this Order XI. is referable to some well-recognised principle giving jurisdiction to the Courts of this country, notwithstanding the residence of the defendant elsewhere. Most of these principles are referred to in the judgment

Appeal. 1893. ATTY.-GEN. v. DRAPERS' CO. Palles, C.B.

of Lord Westbury in *Cookney* v. *Anderson* (1). He there refers to the two grounds on which the legislature of any country is warranted in conferring on its civil tribunals an extra territorial jurisdiction as being—"one, the right which it possesses of binding universally by its laws the persons who owe to it a natural allegiance; the other, the right which it receives by international law, that is, from the consent of nations, of summoning all persons interested, wherever resident, where the subject of the suit arises or is situated within its own territory, and fails to be determined by its own law, and the judgment of its own Courts of civil judicature." And he adds:—"In conformity with these principles, the Act of 2 Wm. 4, c. 33, was framed and based."

Clause (*c*) of our Order XI. was based upon the first of the two grounds thus referred to by Lord Westbury, where "any relief is sought against any person domiciled or ordinarily resident within the jurisdiction." Of the second ground Lord Westbury, in a prior part of his judgment, mentions three instances:—"Thus, by way of example," he says, "it is generally agreed by European nations that all questions relating to the ownership of land must be decided by the *lex loci rei sitæ;* that all questions relating to the succession or administration of the property of a deceased person, whether testate or intestate, belong to the judge of the domicile of the deceased; and that contracts ought to be applied and interpreted by the law of the place where they are made, and where it is intended they should be performed."

Omitting for a moment the consideration of clause (*b*), provision is made by our order for the first class of cases by clauses (*a*) and (*g*), for the second by clause (*d*), and for the third by clauses (*e*) and (*f*).

Another principle is laid down by Lord Westbury in the same judgment in these words:—"If, therefore, an action or suit be commenced in the Courts of a particular country, relating to a subject which, by this consent of nations, is appropriated to the law of that country, it may be right, in order to prevent a failure of justice, to give to such Courts the power of exercising *complete jurisdiction*, and therefore of citing absent parties."

(1) 1 De G. J. & S. 365.

Now, this power of doing complete justice, in a suit relating to a charge on two properties, one within, and the other outside the jurisdiction, cannot, as I have shown, be exercised, if the relief to be given in such a suit must, under all circumstances, be confined to the property within this country. Bearing this in mind, I draw attention to the marked distinction between the alterations effected by Order XI. upon the prior Order X. so far as regards, on the one hand, land within the jurisdiction, and on the other an obligation or liability affecting such land. Land, in its nature, is divisible. If one becomes entitled, under the same title, to two estates, one in England and the other in Ireland, it is right that the title to each should be litigated in the Courts of the country where it is situated. The *lex loci rei sitæ* applies; and, further, the process of the Court must, that the litigation be effective, affect the land itself; and thus, in cases within clause (*a*), the jurisdiction is limited to actions in which the *whole* subject-matter is land within the jurisdiction. But a *charge* upon land and other property has not necessarily the locality of the land. Clause (*b*), accordingly, requires that the "obligation or liability" shall affect (not affect *only*) land or hereditaments within the jurisdiction; nor is it limited by any restriction of the relief, as are (*a*) and (*d*). The words are not "is sought to be construed, rectified, set aside, or enforced so far as relates to such land or hereditaments." They are unlimited; and thus in substance the words are similar to those in 4 & 5 Wm. 4, c. 82, which, I have no doubt, is the germ from which this clause has been evolved.

Another clause in the order strongly supports the view I have taken, viz. (*h*), which authorizes this service whenever "any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction." That is, where the Court, by reason of the residence of one of several parties interested in a subject-matter which in itself is not such as to authorize service abroad, has jurisdiction over a suit in relation to such subject-matter, then it may authorize service out of the jurisdiction upon other persons who are so interested in such subject-matter as to be necessary parties to the suit. The corresponding English clause

Appeal. 1893.

ATTY.-GEN. v. DRAPERS' CO.

PALLES, C.B.

was held by the Court of Appeal in *Massey* v. *Haines* (1) to authorize service out of the jurisdiction upon a person who could be liable only in the event of the defendant within the jurisdiction not being liable. Lord Esher bases his judgment upon there being one transaction, and the plaintiff being entitled to claim relief in the same action alternatively against one or other of two persons.

The second argument for the defendants was that clause (*d*) of the Order showed that a suit for the execution of the trusts of land was not a suit to enforce an "obligation or liability affecting land" within clause (*b*); and it was upon this part only of the argument that I entertained any doubt. It was argued that if the general effect of clause (*b*) were to include the execution of trusts of land, there would have been no necessity to add another sub-section which would include a subject-matter already provided for by the former clause. This, however, is, I think, answered by each clause of the Order having been based, as I have shown, upon a separate ground of jurisdiction. The clauses of an Order so framed must necessarily overlap, as in the case of an ejectment against a domiciled Irishman resident abroad, to recover possession of lands in this country, there would be a jurisdiction under either (*a*) or (*c*). The argument would have been very powerful, could it have been shown that such a construction of clause (*b*) would deny any operation to clause (*d*). This, however, cannot be so, because cases in which the jurisdiction is based on the existence in this country of personal property are not within clause (*b*), and are therefore covered by clause (*d*) only. I do not say that "property" in (*d*) does not include real property: I am clear that it cannot be so restricted; but even reading it in this general sense, the argument goes no further than to show that there may be one subject-matter which is within both (*b*) and (*d*), just as another may be within (*a*) and (*c*). Taking, then, the words of clause (*b*), "liability and obligation" are wide enough to include a trust; and "enforce," in its natural meaning, includes "execute," and indeed this is the only clause which included some constructive trusts of land.

(1) 21 Q. B. Div. 330.

Upon the whole, I am of opinion that the ground of jurisdiction under clause (*b*) is the existence of a charge, obligation, or liability affecting land in this country, either solely or in common with other property, and that where such other property is affected by the charge, the jurisdiction of the Courts of this country, according to international law, extends to giving relief in relation to that charge or obligation, not only as against the real property in this country, but in relation to the entire property upon which it is charged. Once it is established that a suit in relation to the liability is one which ought to be entertained in this country, the effect of Order XI. is to give the High Court here complete jurisdiction to establish that liability, and to enforce it by the same relief as might have been granted in such a suit were all the parties to it resident within the jurisdiction.

In my opinion the order ought to be affirmed, and the appeal dismissed, with costs.

FITZ GIBBON, L. J. :—

While concurring with all that the Chief Baron has said, I should regard this case as falling within both sub-sections (*b*) and (*d*) ; and I think that a decision in favour of the appellants would result in splitting up suits, and making two actions necessary, where under the former practice one would have been enough. It is to be borne in mind that, in dealing with this question here, we are not asked to say whether the Court below has rightly exercised its discretion, but only whether the jurisdiction exists to entertain the action in Ireland.

Our only sources of information are the writ and the affidavits filed upon the motion. The writ asks, with other relief, for a declaration that the defendants were and are trustees of certain lands in Londonderry for the objects of the Plantation of Ulster; that the said objects still remaining to be provided for may be ascertained and declared, and that a proper scheme may be settled for the due application, for the future, of the alleged trust property, and that the defendants may be ordered to apply that property for the objects of the alleged trust. If the first paragraph of the claim, which is limited to lands in Londonderry, stood alone, it is admitted that the jurisdiction would exist, and the case

Appeal. 1893. ATTY.-GEN. v. DRAPERS' CO. Fitz Gibbon, L. J.

would fall within sub-section (*a*), because the lands are situate in Ireland. What is the relation of that paragraph to the others? The second paragraph of the writ asks "that it may be declared that the defendants, in so far as they have sold portion of the estates conveyed to them by the Irish Society, committed a breach of trust by such sale, and that they may be ordered to account for the purchase-moneys, and that the plaintiff may have in respect of the said moneys the same relief as in respect of the unsold estates." There are also inquiries and accounts claimed as to the disposal of certain woods, and an account of the rents, profits, and income received by the defendants out of all the alleged trust property.

Therefore, on the face of the writ, the subject-matter of the action is lands in Londonderry, trusts alleged to have attached to those lands, and relief ancillary to an alleged breach of those trusts. In other words, the claim appears to be one made by *cestuis que trust* in Ireland against trustees, for alleged breach of trusts to be performed in Ireland, affecting land in Ireland. So far as the writ goes, the jurisdiction is *prima facie* clear. The only additional information supplied, for the present purpose, by the affidavits, goes to show that, in the case of each defendant Company, there is an unsold portion of land remaining which ought to be enough to answer any question of jurisdiction. There have been sales of the larger portion, if not almost the whole, of the estates; and land has been turned into money which has been carried off by the defendants to England, their own domicile. But so long as there is any land unsold, the defendants' argument amounts to this:—"You must divide the claim, sue as to one part of the property in England, and as to the other part in Ireland, and this although before the Judicature Act and Rules, you could have asserted your claim respecting all the alleged trust property in a single Irish suit. It is not necessary to say anything, and I say nothing, about the case of a trustee, domiciled in England, originally a trustee of land in Ireland, alleged to have sold the whole of the trust property, conveyed it to a purchaser for value without notice, and carried off the money to England. If a trustee so situated were sought to be made liable for a breach of trust, it might be said that though the original trust property was in Ireland, it had been either con-

verted into property in England, or that in any case relief could only be had in England, where the defendant was domiciled. But if an Irish *cestui que trust* of Irish property does not know what the trustee has done with his property, and sues for an inquiry and account, can the trustee come in with an affidavit and say—"I admit a breach of trust, but I have converted all the property into money, and carried off all the proceeds, say, to England, Spain, or America, and I have gone to live there myself, so you must come after me, if you want relief"? But this case has not yet gone so far; part of the property has been realized and carried off, but part of it remains still *in specie* in Ireland. Therefore, the appellants must argue that, if they be trustees, though they must account in Ireland for the remaining land, the plaintiff must limit his claim to so much of the trust property as they have not yet removed from the jurisdiction. How could an account with just credits be taken between the two portions of the trust fund? The trustees' obligation and liability are indivisible: the account against them must cover the execution of the entire trust, and result in a single balance. Therefore, I hold that so long as we have a trust affecting any land in Ireland, the case is within the Irish jurisdiction, and, as full effect must be given to the trust in a single suit, that suit may be tried in Ireland. This case would be within sub-section (*a*), if the execution of the trust, as prayed, would result in the recovery of the possession of the land by the plaintiff; and this fact affords an additional argument in favour of the contention that equitable relief in respect of the same land must be obtainable here under some other sub-section, if not under (*a*).

In *Thomas* v. *Duchess of Hamilton* (1) the idea was never suggested that the cause of action could be divided; the action was brought on a specially endorsed writ for one liquidated sum, the balance of an account for goods sold and delivered, jewelry supplied to the defendant, who was a foreigner residing abroad; the question was whether the price of this jewelry was, by the contract of sale, payable in England or abroad. But the Judges were dealing with only one contract for the sale of one lot of

(1) 17 Q. B. Div. 592.

Appeal. 1893.

ATTY.-GEN. v. DRAPERS' CO.

Fitz Gibbon, L. J.

jewelry, and all their observations were pointed to the single question: Whether that contract was to be performed in England? Counsel for the plaintiff contended that if the cause of action was a breach of a contract beyond the jurisdiction, the service out of the jurisdiction was bad; but if the service out of the jurisdiction was good, the plaintiff ought not to have been put under any limitation, and therefore the question on which the jurisdiction depended ought to have been determined in the first instance. Butt, J., in the Queen's Bench took this view, and said:—"The ground on which the order for service out of the jurisdiction was made in this case is, that the breach of contract arose within the jurisdiction. Unless it appeared that such was the case, the order for such service is altogether wrong, and ought to have been set aside, but if it did so appear, I fail to see what power there is to impose this limitation on the plaintiff's claim." But in the Court of Appeal the Judges dealt with it as a case of a single contract, and substantially held that as there was a serious question on the affidavits whether there had been a breach within the jurisdiction, the plaintiff might justly be subjected to the condition that, if the Court exercised its discretion in his favour by permitting him to proceed upon the service out of the jurisdiction, he should have a verdict against him if he failed to prove at the trial a breach of contract within the jurisdiction. It was assumed throughout that, if such a breach were proved, the amount recoverable would cover the whole cause of action.

To come back to our own case, it is impossible to hold that the different sub-sections of the rule do not overlap. They deal with different categories, but the exercise of jurisdiction often depends upon different principles, of which more than one may apply to the same case, and, therefore, the same case may fall within more than one head of jurisdiction. I think it very possible that the draftsman, in drawing sub-section (*b*), having regard to the terms of sub-section (*a*), intended to reserve trusts to be afterwards dealt with. The words used are not very applicable to trusts, though "act, deed, will, contract" might include or establish the creation of a trust. Trusts may be "construed," they are sometimes "rectified," but "enforce" is the only word in sub-

section (*b*) which is commonly and technically applicable to a trust.

The word most appropriate to trusts is used in sub-section (*d*), namely, "execute": "property within the jurisdiction" must include mixed funds, *e.g.* trust property consisting partly of land and partly of money, and, as the Chief Baron has pointed out, that case would not be within sub-section (*b*) at all. Therefore, I think the words of sub-section (*d*) should be taken to include both personalty alone, and also mixed property.

But I come back to the broad ground. This is an action for the execution of a trust, and we are bound to assume at present that the alleged trust is to be found in a written instrument; part of the trust property still forthcoming is land within the jurisdiction, and all of it would still be so, but for acts of the defendants alleged to be unlawful. I guard myself against saying that a trustee of property situate within the jurisdiction can escape being sued here because he has conveyed the property away, but so long as part of it remains here, though these rules were intended to limit the exercise of jurisdiction in some respects, I hold that it was never intended that a suit for the execution of one trust should be split into two; and where the trust is to be executed with respect to some property within the jurisdiction, the liability of the trustee, upon his single obligation, is all within the same jurisdiction, and the same Court can give plenary relief, and is not to be limited by the mode in which the trustee has disposed of part of the trust property. It will, of course, be remembered that we do not now say that there has been any breach of trust, or even that there is any trust—those are the matters to be tried—but I do say that it would be a rather remarkable effect of the new Judicature Rules, if there was no longer any jurisdiction to try in Ireland the question which has been mooted for so many years, whether the London Companies hold their Ulster Plantation Estates upon public trusts.

BARRY, L.J.:—

Further than expressing my concurrence in the conclusion arrived at by my colleagues, after the elaborate and learned judgments which have just been pronounced, I do not intend to add anything.

Appeal.
1893.
ATTY.-GEN. *v.* DRAPERS' CO.
Barry, L.J.

I own that from an early stage of the argument I was struck with the result of the argument of the appellants. The result they contended for was this:—Given an estate in Ireland, a trustee in breach of trust sells the trust property, and appropriates to his own use the purchase-money of one-half of the property—the amount does not matter as to jurisdiction—and having disposed of it for his own purpose in England, he is sued by his *cestui que trust* in Ireland, and the *cestui que trust* demands back the remaining half of the land and an account of the money; and certainly since equity suits were first framed the two remedies should be pursued together, namely, to get back the land and the money misappropriated; but now the result is that rules introduced under an Act of Parliament, having for their object the prevention of multiplicity of suits, would require two suits to be brought to obtain relief. He must bring one suit here and the other suit in England. That was never in the contemplation of the framers of the rules. I am bound to say that the rules are not all lucidity or comprehensiveness, but I am sure they never contemplated such a state of things as to narrow the jurisdiction of service of writs out of the jurisdiction to the Acts of Wm. 4.

As to another argument pressed by Mr. Atkinson, namely, that sub-section (*a*) renders others unnecessary, or that (*d*) renders sub-section (*b*) unnecessary, I think, as the Chief Baron and Fitz Gibbon, L.J., have said, there is an overlapping, and that to provide for a great number and diversity of cases, over-lapping was adopted. Sub-section (*a*) deals with a simple case: There is land in Ireland; you want to obtain possession of it. There is the whole matter, in which the physical thing is within the jurisdiction. But if you tried to bring in under that all that is in (*d*) you would find it difficult.

As to the word "execution" of a trust, I am not sure as to enforcing a trust against a trustee that that is more aptly described by "obligation" concerning land than by execution of a trust, I do not stop to inquire into that.

But sub-section (*b*) fairly includes the present suit; and having regard to the facts, it seems to me this is all one suit dealing with one subject-matter—land in Ireland; and it also seems to me that a suit to obtain an account of the money produced by the

sale of those lands by the trustee is not the same as the recovery of the land.

I am of opinion that this case falls within sub-section (*b*). I do not say that it does not fall within sub-section (*d*). It might be within both. If I thought that this was an action so constituted as to be a colourable action to enforce the trusts on land here, so as to involve litigation about large sums of money in England, that might be another matter, because in Rule 2 of Order XI. the Judges are to have regard, in allowing service out of the jurisdiction, to the balance of convenience, the comparative cost of proceedings in Ireland, and the amount or value of the property affected. But I find no such case here.

Solicitor for the relator: *J. Campbell White.*
Solicitors for the defendants: *Hallowes & Hamilton.*

R. D. M.

WILEY *v.* CHANTEPERDRIX.

M. R.
1893.
June 9, 23.

Will—Construction—Gift to children in equal shares—Meaning of words "with benefit of survivorship"—Gift of income of property indefinitely.

A testator by his will bequeathed to his wife for life so much of the income of railway shares as would amount to £200 per annum, and to his children A and B, during the life of his wife, as much more of the income as would produce £100 per annum; and after the death of his wife bequeathed the said annual sums of £200 and £100 per annum, derivable from the said shares to and amongst his three children A, B, and C, and their executors and administrators, in equal shares, with benefit of survivorship between them. All three children survived the testator, but predeceased the widow. C survived A and B:—

Held, that A, B, and C took vested interests, liable to be divested, as to each, in the event (which did not happen) of his or her dying before their mother, leaving others or other of them who should survive the mother, and that the capital representing the annual sums of £200 and £100 per annum belonged, in equal shares, to the personal representatives of A, B, and C.

ADJOURNED SUMMONS.

This was an originating summons to obtain the opinion of

M. R. 1893. WILEY *v.* CHANTEPERDRIX.

the Court on certain questions arising under the will of William Wiley.

The testator, by his will, dated the 30th May, 1864, after reciting that he was seised of certain fee-simple estates, and was possessed of certain railway shares producing the annual income of in or about £350, devised his said real estates as therein mentioned, and bequeathed to his wife Anne Wiley as much of the interest and dividends and other proceeds of the said railway shares of which he was possessed as would amount to £200 per annum during her life, provided she should remain single and unmarried, and bequeathed to his children, Ellen and James Peter, as much more of the income, dividends, and other produce of the said railway shares as would produce £100 per annum for the term of their natural lives, and upon her death he bequeathed the said annual sums of £200 and £100 so derived from the said shares to and among his three children, Mary Jane, Ellen, and James Peter, and to their executors and administrators, in equal shares, with benefit of survivorship, between said three children, and declared that should either of his said three children succeed to his said fee-simple estates, under the provisions of his will, the child so succeeding should cease to have any estate or interest whatsoever in the income derivable from the said shares; and in the event of there being any surplus income derivable from the said shares over and above the sum of £300 per annum, the testator bequeathed such surplus income to his sister Margaret Wray for her life, and after her death, to her issue, in such manner as she should appoint; and the testator appointed his said wife and Alexander Davidson trustees, and executrix and executor of his said will, but did not name any residuary legatee.

The testator died the next day, the 31st May, 1864, and the will was proved by his widow, Anne Wiley, Alexander Davidson having renounced. The testator's children all survived him, that is to say, two sons, Albert and James Peter, and two daughters, Mary Jane and Ellen. Mary Jane died an infant in 1865. James Peter also died an infant in 1867. Ellen married, in 1879, Martin Chanteperdrix, and died the 15th January, 1890, intestate, leaving three children, who were made defendants to the summons. Her husband, Martin Chanteperdrix, died the 15th September,

1890, intestate. The testator's widow, Anne Wiley, died the 29th March, 1892. Administration to Martin Chanteperdrix had been granted to Anne Wiley and to Albert Wiley, the plaintiff in the summons, during the minority of the children. Albert Wiley was also sole legatee and executor of his mother's will. He subsequently took out administration to his sister Mary Jane, and to his brother James Peter, and to his sister Ellen, during the minority of her children. The testator's sister Margaret Wray died the 27th October, 1892, leaving only one child, Margaret Wray, then Margaret Brown, wife of Alexander H. Brown, her surviving. The testator's sister did not make any appointment under the will. She had issue, besides Margaret Brown, three sons, who married, and died without issue, each leaving a widow.

The railway shares of the testator were of the value of over £7000, but the income derivable therefrom amounted during the past fifteen years to about £290 on an average, and only on one occasion, in 1890, exceeded £300, when it amounted to £303. In 1892 it amounted to £284 8*s.* 6*d.*

Albert Wiley, the eldest son of the testator, as his personal representative, and also as one of his next-of-kin, took out a summons, to which the three children of his sister, Ellen Chanteperdrix, and Margaret Brown, were made defendants, to have the following questions determined by the Court:—

1. Whether the bequest to Mary Jane, Ellen, and James Peter was a good gift of the *corpus* of so much of the shares as should be sufficient to produce the two annual sums of £200 and £100, and at what date the value of such shares should be ascertained.

2. Whether Ellen Chanteperdrix, having survived Mary Jane Wiley and James Peter Wiley, became entitled to the entire of such shares, or whether upon the death of the testator each of them, Ellen, Mary Jane, and James Peter, became indefeasibly entitled to an equal third part of such shares, subject to certain interests by the will declared during the life of the testator's wife, Anne Wiley.

3. Who is or are, in the events which have happened, now entitled to the said shares, and the income thereof, and in what proportions.

M. R. 1893.

WILEY v. CHANTEPERDRIX.

Serjeant Campion, Q.C., and *John W. Richards*, for the plaintiff.

A gift of income for an indefinite time is a gift of the capital, and it is submitted that all three children took vested interests in so much of the capital of the shares as produced an income of £300 per annum. There are no words sufficient to divest this gift, as all the three children died in the lifetime of their mother. There was no one to take under the survivorship clause. If any one child had survived the tenant for life, such child would have taken the whole of the capital represented by an income of £300 per annum, but that event did not happen, and the gift over could not take effect.

[They cited *Maddison* v. *Chapman* (1), *Belk* v. *Slack* (2), *Browne* v. *Lord Kenyon* (3), *Vorley* v. *Richardson* (4), Hawkins on Wills p. 263.]

Robertson, Q.C., and *Jefferson*, for the defendants, the infant children of Mrs. Chanteperdix :—

There is no doubt that the gift of the income passed the capital, but the question is who was entitled to it on the death of the tenant for life. At that time Ellen Chanteperdrix was the survivor or longest liver of the three children, and it is submitted that her children are entitled, in her right, to the capital, which represents an income of £300 per annum. The effect of the contention of the other side is to strike out of the will the words "with benefit of survivorship between said children," which it is submitted mean that whoever of the three children lived the longest was to take the capital absolutely. *Maddison* v. *Chapman* (1) is distinguishable ; as to *Belk* v. *Slack* (2), see Jarman on Wills, p. 1525. [They also cited *Scurfield* v. *Howes* (5), followed in *White* v. *Baker* (6), *Taaffe* v. *Conmee* (7), *Re Crawhalls' Trusts* (8).]

Henry Maxwell, for the defendant Margaret Brown :—

Margaret Brown is the only surviving child of the testator's

(1) 1 J. & H. 470.
(2) 1 Kee. 238.
(3) 3 Madd. 410.
(4) 8 De G. M. & G. 126.
(5) 3 Bro. C. C. 90.
(6) 2 De G. F. & J. 55.
(7) 10 H. L. Cas. 64.
(8) 8 De G. M. & G. 480.

sister Margaret Wray, to whom the surplus income, over and above £300, was given for life, with power of appointment amongst her children. She did not exercise this power. She had three other children, who predeceased her. In default of appointment the surplus is divisible between all her children, and the personal representatives of the deceased children should be parties to this proceeding.

[THE MASTER OF THE ROLLS:—I can appoint you to represent them.]

The value of their interest should be calculated; there has been no surplus of late years, except on one occasion, but there may be one.

John W. Richards, in reply:—

As to the first question, it is clear on the authorities that a gift of the interest of a fund unlimited as to time vests the *corpus*; and in *Rawlings* v. *Jenkins* (1) it was actually decided that a bequest of "£200 per year being part of the moneys I now have in bank security," was an absolute gift to the legatee of the *corpus* of so much of the bank stock as would produce £200 per annum. In the present will there are gifts of two annuities of a greater amount than the railway shares produced, either at the date of the death of the testator, or of the tenant for life, and at one or other of these periods the amount necessary to produce the annuities must be ascertained. Therefore the entire *corpus* of the railway shares passes to whoever is entitled to the annuities.

As to the second question, it is not contended that any portion of the will should be struck out, but that the words of survivorship should refer to the death of the tenant for life. The first gift is a clear absolute gift to Mary Jane, Ellen, and James Peter, "and to their executors and administrators in equal shares." This absolute gift will not be cut down unless there is someone to take under the survivorship clause. But no one survived the tenant for life, so there is nothing to divest the former absolute gift. The facts of the case are almost identical with the case put by Sir W. Page Wood in *Maddison* v. *Chapman* (2). In *Vorley* v. *Richardson* (3)

(1) 13 Ves. 39. (2) 1 J. & H. at p. 478. (3) 8 De G. M. & G. 126.

M. R. 1893. WILEY v. CHANTEPERDRIX.

the exact words "with benefit of survivorship" occur, and it was held there that survivorship referred to period of distribution. Here, in the event of all the children dying before the period of division, the testator could have had no possible reason for preferring the longest liver. In *Scurfield* v. *Howes* (1), relied on by the other side, the words were "if either of them should die before the decease of their mother, the whole to the survivor"; and in *White* v. *Baker* (2), the words were "in case of the death of either of them in the lifetime of my said wife, then upon trust to pay the whole to the survivor of them." In both these cases the event referred to was to one of the persons named surviving the other.

June 23.

THE MASTER OF THE ROLLS, having read the will, and stated the facts of the case, and how the questions to be determined arose, proceeded as follows :—

In this state of facts the principal question is, who is or are entitled to the railway shares mentioned in testator's will?

There can be no doubt that the will, by disposing of the income of the shares indefinitely disposes of the shares themselves. An unlimited right to the income in perpetuity is inconsistent with the concurrent existence of any property in anyone else; and on the principle of *Rawlings* v. *Jennings* (3), *Page* v. *Leapingwell* (4), and many other cases, I think there is in this will a disposition of *corpus*, and indeed any other view would result in an attempt to create a perpetuity.

The real question is as to the meaning of the clause of survivorship. The facts necessary to bear in mind when construing it are:—1, that all three children, legatees of the interest and dividends on the stock, survived the testator; 2, that all three predeceased Mrs. Wiley, who was tenant for life of £200 per annum, and on whose death the £100 per annum, being the rest of the £300 per annum went over; and 3, that of the three children, Ellen (Mrs. Chanteperdrix) was, in fact, the survivor. Thus, if the words "with benefit of survivorship between said three children," mean that the longest liver of the three

(1) 3 Bro. C. C. 90.
(2) 2 De G. F. & J. 55.
(3) 13 Ves. 39.
(4) 18 Ves. 463.

takes all, irrespective of the time at which such survivorship occurs, the personal representative of Mrs. Chanteperdrix would be entitled.

It is a rule of law clearly settled, after a long course of decision in an opposite sense, that in bequests of personal estate words of survivorship are *prima facie* to be referred to the period of payment or distribution, and not to the death of the testator.

In *Cripps* v. *Wolcott* (1), the Vice-Chancellor says:—"I consider it, however, to be now settled, that if a legacy be given to two or more, equally to be divided between them, or to the survivors or survivor of them, and there be no special intent to be found in the will, the survivorship is to be referred to the period of division. If there be no previous interest given in the legacy, then the period of division is the death of the testator, and the survivors at his death will take the whole legacy. This was the case of *Stringer* v. *Phillips* (2). But if a previous life estate be given, then the period of division is the death of the tenant for life, and the survivors, at such death, will take the whole legacy. There is no rule of construction more definitely settled than this, in the whole scope of our law of testamentary interpretation."

In the present case the period of distribution is the death of Mrs. Wiley; and, if the rule applies, that is the date at which the survivor should be sought for. But there was no survivor of the three children at that time, all having died previously. Therefore (the contention is), that as the survivorship clause cannot apply, we are thrown back upon the previous gift, which is absolute and indefeasible, save in the one event which has not occurred. Thus it was argued that all three children took under the earlier words, vested estates, as tenants in common, and that the money goes in thirds to their respective personal representatives. On the other hand, it was contended that the natural meaning of "survivor" is the person who lives longest; that there is discoverable in the present case a "special intent"—showing that the words of survivorship should have their ordinary meaning, and not that to be gathered from the rule in *Cripps* v.

(1) 4 Madd. 15. (2) 1 Eq. Cas. Abr. 292.

M. R. 1893. WILEY v. CHANTEPERDRIX.

Wolcott (1); and that thus Mrs. Chanteperdrix took the whole, though she did not live till the time of distribution.

Now one thing is clear—that, if the English language can do it, the three children took, as tenants in common, interests vested on the death of the testator, unless that contention is forbidden by the survivorship clause. [THE MASTER OF THE ROLLS read the clause.] What, then, is the meaning of the words "with benefit of survivorship between the said children"?

This form of words often occurs in wills; but before proceeding to consider its import (and indeed no stress was laid upon it in the argument), let us see if there is any evidence, apart from the form of expression in question, of any such general or special intent as would take the case out of the general rule. The reason of the rule is, that as of several people, some must, in all human probability, survive the rest; and as it cannot possibly be imputed to a parent that he should make his bounty to his children dependent merely upon the accident of which should live longest—the others possibly having married and left children before dying—the survivorship must be referable to surviving the others at some fixed time, as, for instance, surviving the testator himself, or surviving the age of twenty-one years, or surviving the time when the fund is to be actually received; and that the last is the most reasonable intention to be presumed. It must be a question of intention however in this sense, that if a different intent be expressed, or can be reasonably inferred from the will, it will prevail.

Cases of this description are not wanting, such as *Scurfield* v. *Howes* (2), and *White* v. *Baker* (3), which were relied on by counsel for the children of Mrs. Chanteperdrix. In the latter of these cases the words of the will were:—"As to the sum of £5000 sterling, or the stocks, funds, or securities upon which the same shall be from time to time invested, upon trust to pay the dividends, interest, and produce thereof unto my said wife, for and during the term of her natural life, and to and for her own absolute use and benefit, and from and after her decease upon trust to pay, transfer, and assign the said trust sum of £5000, or the

(1) 4 Madd. 15. (2) 3 Bro. C. C. 90. (3) 2 De G. F. & J. 55.

stocks, funds, or securities upon which the same shall be invested, between my said son Edward Richard, and my said grandson Arthur White, in equal shares and proportions, and in case of the death of either of them in the lifetime of my said wife, then upon trust to pay the whole of the said trust fund of £5000, and interest, as aforesaid, unto the survivor of them, the said Edward Richard and Arthur White, his executors, administrators, and assigns." There there was a special statement of the time when survivorship should take place. The Lord Chancellor, at p. 60, says:—"According to the grammatical and natural meaning of the language of the will, such I think must be taken to have been the intention of the testator. In case either the son or grandson should die in the lifetime of the widow, the whole sum of £5000 was to go to the survivor of the son and grandson, his executors, administrators, and assigns. The *survivorship* was that of the son surviving the grandson, or the grandson surviving the son. The ultimate disposition of the fund was to be determined on the death of the son or grandson in the lifetime of the widow, without any consideration as to either of them surviving the widow. According to the contrary construction contended for, it is admitted that if the grandson should survive the widow he would be entitled to the whole; but the son or grandson are supposed to have taken a vested interest in the moiety of the £5000, liable to be divested only on the double contingency of one of them dying in the lifetime of the widow, and the other surviving her. I cannot think that the testator had any notion that the personal representatives of the predeceasing son or grandson could have any interest in the fund. It is allowed that the whole was to go to the son or grandson if he survived the widow, and it would seem strange that the representatives of the predeceasing son or grandson, who could make no claim if the survivor of the two should survive the widow, should be entitled to a moiety if both died in the widow's lifetime. In the absence of any words expressly to denote such an intention, I think (irrespective of the authorities), that in the event that has happened the same effect is to be given to this clause as if the grandson alone had been named legatee after the death of the widow." He accordingly decided that the period of

M. R. 1893.

WILEY v. CHANTEPERDRIX.

survivorship was fixed by the will on a death occurring in the lifetime of the widow.

Turner, L.J., concurred. He says, at p. 64:—"Where there is a bequest to A for life, and after his death to B and C or the survivor of them, some meaning must, of course, be allotted to the words "the survivor." They may refer to any one of three events—to one of the persons named surviving the other, to one of them only surviving the testator, or to one of them only surviving the tenant for life, and in the absence of any indication to the contrary they are taken to refer to the latter event, as being the more probable one to have been referred to; but where as in the present case, the bequest is to A for life and after his death to B and C, and in case either of them dies in the lifetime of A, the whole to the survivor, it is plain that the words in their natural import refer to the one surviving the other, and the question is not to which of the events above mentioned the testator intended to refer, but whether there is any context to alter the meaning of the words which he has used. There does not appear to me to be any such context in this case, and I think, therefore, that, with all respect to the Master of the Rolls, the decree must be altered accordingly."

The words of the will in *Maddison* v. *Chapman* (1) are not the same as those with which I have to deal; but the case is of value as containing a very clear enunciation of the law by Lord Hatherley, who says, at page 478:—"In those cases, where there is a gift to A for life, and, after the death of A, to B and C, and the survivor of them, the Court has commonly proceeded on one of these grounds:—First, that the original gifts are vested, subject to a divesting clause, applicable only to the event of one being dead at the determination of the life estate, leaving a survivor; so that, if all the class die before that time, there is no divesting, but the original gifts remain in force; or, secondly, that the period of survivorship is to be fixed with reference to the death of the tenant for life; and if all die before that time, the contemplated survivorship has never occurred. This seems to rest on the more solid foundation, because a testator must be concerned in looking to

(1) 1 J. & H. 470.

the period when the property will vest in actual possession and enjoyment, which must be postponed to the death of the tenant for life. In the survivorship clause, a testator contemplates the personal beneficial enjoyment by the persons indicated, rather than the contingency of all of them having died and became incapable of beneficial enjoyment except in the sense of transmission when represented accordingly, in the class of cases I have referred to survivorship is referred to the period when the property vests in possession." He then discusses and distinguishes *Scurfield* v. *Howes* (1), and *White* v. *Baker* (2).

If therefore, the words in the present will, " with benefit of survivorship between said three children," are equivalent to the phraseology in the cases I have quoted, and mean " to them or the survivor or survivors of them," there can be no doubt that the survivorship is to be ascertained as of the date of the death of Mrs. Wiley, the tenant for life, when the fund became distributable. It is on this point only that I have had any doubt, questioning whether "survivorship between said three children" might not point to a survivorship *inter se*, independent of the period of distribution, and give the fund to the longest liver of the three, whether dying before or after that time. I am, however, quite satisfied that such is not the correct interpretation of the words. "Survivorship," when there is a class—or a number of named individuals—must always include survivorship *inter se*, whether the survivors are to be ascertained at the death of the testator, or on attaining twenty-one, or on the death of the tenant for life. This proposition needs no elaboration; and so in this context " survivorship between said three children " means no more than survivorship, leaving it open to determine, on other grounds, *when* the survivors of the said three children are to be ascertained. This is the correct inference, independent of authority; and in several cases—of which *Berry* v. *Briant* (3) is an instance—the occurrence of similar words has not been treated as creating any difficulty. In *Berry* v. *Briant* (3) the words were " with benefit of survivorship *among them*," which are not distinguishable from those before me. Thus the phrase " survivorship *inter se*," which occurs frequently in the text-books,

(1) 3 Bro. C. C. 90. (2) 2 De G. F. & J. 55. (3) 2 Dr. & Sm. 1.

M. R. 1893.

WILEY v. CHANTEPERDRIX.

and in particular in Mr. Jarman's book, and which is used to denote survivorship in general, irrespective of any particular time, is not applicable in that sense to the case before me.

"With benefit of survivorship" is, as I have said, a favourite expression with testators; but obviously it is a compendious phrase, and one which, if expanded, would, in a case like the present, be equivalent to some such words as "or to the survivors or survivor of them." It occurs in many reported cases, and, no doubt, has occurred in thousands of cases not reported, and which have not come into Court at all. In the reports we find it in (amongst others) *Berry* v. *Briant* (1); *Vorley* v. *Richardson* (2); *Knight* v. *Knight* (3); *Tribe* v. *Newland* (4); *Trusts of Crawhall* (5); and in none of these cases is it suggested that in reference to the rule in *Cripps* v. *Wolcott* (6), it makes any difference whether the will says "or to the survivors or survivor," or, "with benefit of survivorship," or of "survivorship among them." Whether the substituted phrase be "*or* to the survivor," or "*and* to the survivor" cannot really make any difference when there has been a previous creation of a clearly defined tenancy in common. In the present case the words are the amplest that could be contrived to confer vested estates as tenants in common. The survivorship is in no way connected with, or referable to, life estates. These vested estates as tenants in common can be got rid of only by an executory devise. They are there—defined—vested—only to be determined by some executory limitations over. Therefore the words "with benefit of survivorship"—to which some meaning must be attached—must take effect, if at all, by way of executory devise. The words "and to the executors and administrators" render this view simply imperative. I have no hesitation in holding that under this will the three children took vested interests liable to be divested as to each in the event of his or her dying before the period of distribution, *i.e.* before the death of the mother. The case is free from the complication which sometimes arises from the introduction of a third element—such as the attainment of a particular age—as occurred in *Vorley* v. *Richard-*

(1) 2 Dr. & Sm. 1.
(2) 8 De G. M. & G. 126.
(3) 25 Beav. 111.
(4) 5 De G. & Sm. 236.
(5) 8 De G. M. & G. 480.
(6) 4 Madd. 15.

son (1) and many of the other cases. There is here no *tertium quid.* Survivorship must refer to the death of the testator or that of the tenant for life; and I think it plainly refers to the latter.

What, then, is the result of this view? We have vested estates conferred, which are to be defeated in one event only—that of some of the legatees surviving the period of distribution—an event which has not occurred. But it is an absolute rule that a vested estate cannot be divested save by the occurrence of the very event on which the property is to go over. In *Browne* v. *Lord Kenyon* (2) the Vice-Chancellor says:—"The obvious meaning is, that if one only survived the tenant for life he should take the whole. It is in expression, therefore, a vested gift to the two as tenants in common, subject to be divested if one alone should survive the tenant for life, but which never was divested because that event did not happen. The two brothers, therefore, took vested interests as tenants in common, and the money is now divisible between their representatives. It may be well doubted whether this was the real intention, and whether the testatrix did mean that either brother should take any interest without surviving the tenant for life, but the force of the expression is otherwise."

And in *Belk* v. *Slack* (3) there was a similar decision on a will differing in some respects. There the testator gave the residue of his real and personal estate to trustees, upon trust to pay the interest and produce thereof to his mother during her life, and after the decease of his mother and daughter he devised and bequeathed the same to his brother, George Belk, and his sister Hannah Belk, to be equally divided between them, share and share alike, or to the survivor or survivors of them. There must have been some provision in the will for the daughter, which is not mentioned in the report. The testator's mother, daughter, brother, and sister, survived him. His brother died in 1820, and his sister had not been heard of for upwards of thirty years. The testator's daughter and sole next-of-kin survived the testator's mother and died in 1821. The question was whether the plaintiff, as personal representative of George Belk, was entitled to a moiety of the residue of the personal estate (there being no real estate),

(1) 8 De G. M. & G. 126. (2) 3 Madd. 410. (3) 1 Kee. 238.

M. R. 1893. WILEY v. CHANTEPERDRIX.

or whether the residue was undisposed of at the death of the surviving tenant for life, and went to the testator's next-of-kin. The argument was whether the rule in *Cripps* v. *Wolcott* (1) applied, and the legacy was undisposed of, or whether the legatees took vested interests. The Master of the Rolls held that Hannah Belk must be presumed to have died in the lifetime of the surviving tenant for life, and that the plaintiff and the representative of Hannah Belk were respectively entitled, at the death of the surviving tenant for life, to a moiety of the residue.

To the same effect is *Knight* v. *Knight* (2), a case in which, however, as in *Vorley* v. *Richardson* (3), the period at which the survivorship was to be ascertained was, by the terms of the will, the attainment by the legatees of the age of twenty-one.

As regards the case of *Taaffe* v. *Conmee* (4) the difficulty arises not so much in distinguishing, as in applying it. I think it has no bearing on the question in this case at all. It was an appeal from the decision of Lord Chancellor Brady (5). The words of the will there were: "For default of such issue male in the said Daniel Farrell, then to the use of my nieces, Julia Anne Farrell (otherwise Conmee), Rose Farrell, and Bridget Farrell, and the survivor of them, for the term of their natural lives, as tenants in common, and not as joint tenants, and from and after their death to the use of their first and every other son and sons, and the heirs male of their respective bodies successively, in equal proportions, the elder of such sons of each of my said nieces, and the heirs male of their bodies being always preferred, and to take before the younger, and the heirs male of their bodies, and for default of such issue male, then to the daughters of the said Julia Anne Conmee, otherwise Farrell, Rose Farrell, and Bridget Farrell, and for default of such issue, male or female, to my own right heirs." Daniel Farrell (the testator's nephew), and his three nieces survived him. The nephew died subsequently, unmarried; the three nieces were then all alive. Julia had a daughter, Catherine; Rose and Bridget had each a son. Julia and Rose died. A special case was stated for the opinion of the Lord

(1) 4 Madd. 15.
(2) 25 Beav. 111.
(3) 8 De G. M. & G. 126.
(4) 10 H. L. Cas. 64.
(5) 12 Ir. Ch. R. 338.

Chancellor (Brady) on the construction of the will. He made a decree, declaring that Catherine Conmee, on the death of her mother, Julia became entitled to an estate in fee-simple in one-third of the lands devised, and that there was no necessity for implying cross-remainders between the issue male of the nieces, as the intention was that the limitation to the daughter of each niece should take effect after the failure of issue male of each; that Bridget did not take by survivorship the estates limited to the other two nieces for their lives respectively, but that on the death of Daniel Farrell the limitation to each of the nieces took effect in possession. The House of Lords reversed his decision, and held that the nieces took as tenants in common for life with cross-remainders between them for life; that on the deaths of Julia and Rose, the "survivor" Bridget took the whole for life; that the sons took a remainder, expectant on her death, as tenants in common in tail male, and that there was no estate in any daughter of a niece until a total failure of issue male. Lord Westbury there says, that Lord Chancellor Brady appears to have arrived at the conclusion that the word "survivor" must either be rejected as insensible and repugnant to the general manifest intention of the will, or be referred to the death of Daniel Farrell, which he (the Lord Chancellor) believed to be the true construction, or at all events that it must be considered as so uncertain in its meaning as to be incapable of controlling the previous distinct language. Lord Westbury discusses what ought to be the interpretation of the word "survivor" in a gift of real estate, and comes to the conclusion that in the case before him it should be regarded not as referring to any particular event previously mentioned, but as referring to the natural meaning of the word, namely, that individual person who, out of the individuals named, should turn out to be the longest liver. He then continues as follows:—"It has been sometimes objected that this interpretation of the word "survivor" cannot be adopted where there is a gift to several persons as tenants in common, not as joint tenants. But there is obviously a very great distinction between the limitation of survivorship that is involved in a gift of joint tenancy, and the limitation of the word 'survivor' which is annexed to a tenancy in common. The survivorship

M. R. 1893. WILEY v. CHANTEPERDRIX.

involved in an estate in joint tenancy is that which is capable of being defeated at the pleasure of the joint tenant, so that if, by alienation or otherwise, the joint tenancy is converted into a tenancy in common, the survivorship ceases; but when a gift to the 'survivor' is annexed to a tenancy in common, and not to a joint tenancy, then the limitation takes effect by virtue of the gift, and not by virtue of something involved in a limitation of joint tenancy." The decision of the House of Lords in that case was on the language of a will quite different from the will before us, and leaves the rule I have referred to untouched.

I am therefore of opinion that the capital which represents the annual sums of £200 and £100 per annum belongs in equal shares to the personal representatives of the three deceased legatees, and that the surplus, if any, belongs to Mr. Maxwell's clients.

There was another question raised by the summons, but not argued, namely, at what date the value of the shares was to be ascertained. I apprehend that it would be at the date of the death of Mrs. Wiley, the tenant for life. Portion of the capital consists of £125 deferred stock, upon which no dividend has as yet been paid. Under these circumstances I think there must be an inquiry at Chambers, if Mr. Maxwell asks for it, to ascertain how much of the capital represents an income of £300 per annum, and what surplus there is, if any.

Henry Maxwell: I will not press for an inquiry.

THE MASTER OF THE ROLLS: Then I shall not direct any inquiry, but declare all parties entitled to their costs out of the fund.

THE COURT made the following order:—

"This Court doth declare that the capital representing so much of the interest, dividends, or other proceeds of the railway shares belonging to the testator in this action as would amount to £200 and £100 per annum at the decease of his wife Anne Wiley, now deceased, belongs in equal one-third shares to the personal representatives of Ellen Chanteperdrix, otherwise Wiley, Mary Jane Wiley,

and James Peter Wiley, respectively, deceased; and the Court doth further declare that the surplus, if any, of the said railway shares, and the dividends, interest, and income thereof, if any, belongs to the children of testator's sister, Margaret Wray; and it appearing to the Court that the said railway shares were not sufficient at the death of the said Anne Wiley to produce the sums of £200 and £100 per annum, this Court doth declare the personal representatives of the said Ellen Chanteperdrix, otherwise Wiley, Mary Jane Wiley, and James Peter Wiley, respectively, entitled to one equal third part of the *corpus* of such shares, and it is ordered that the defendant Margaret Brown, the only surviving child of the said Margaret Wray, be appointed to represent the class of children of the said Margaret Wray; and this Court doth declare the several parties entitled to their costs out of the funds in this suit, when taxed and ascertained, the plaintiff's costs to be taxed as trustees' costs."

Solicitor for the plaintiff: *R. O. Norwood.*
Solicitor for the infant defendants: *Harford Kelly.*
Solicitor for the defendant Margaret Brown: *F. H. Miller.*

W. L.

IN THE MATTER OF THE ESTATE OF THE ASSIGNEES IN BANKRUPTCY OF JOHN AIKIN.

Solicitor—Retaining lien—Action—Judgment—Waiver.

A solicitor does not lose his retaining lien by suing his client and obtaining judgment for his costs.

HEARING of final schedule. Several objections were filed, including one by Anthony Cassidy, incumbrancer No. 11, to the priority given to William Caldwell, who was placed No. 4, as executor of Archibald Collum, solicitor, deceased, on foot of certain deeds lodged, subject to lien for costs due by John Aikin to the said Archibald Collum, on foot of which the sum of £740 was claimed. The point substantially relied on by the objector was that the said William Caldwell and Margaret Elizabeth Caldwell, deceased, as executor and executrix of the said Archibald Collum, had, on

Monroe, J. 1893.

In re AIKIN'S ESTATE.

the 19th July, 1876, obtained judgment against the said John Aikin for £378 6*s.* 1*d.*, the amount ascertained upon an inquiry before the Master of the Queen's Bench Division, to be due on foot of said costs, and £70 8*s.* 11*d.*, costs of suit; and that by such proceedings the executor had waived and abandoned the lien.

M'Laughlin, Q.C., for Anthony Cassidy:—

Our proposition is that the executor of the late Mr. Archibald Collum, having obtained judgment for the costs, lost his lien. The amount claimed is not only the amount of the costs, but the costs of the judgment and interest. The position of the solicitor's representative was thus materially altered from what it would have been if left resting on the lien. The Act of 1870 (33 & 34 Vict. c. 28), sect. 17, first enabled the taxing officer to allow interest on disbursements. There is no general right to charge interest on costs, and only a statutory mitigated right to charge interest on outlay. When a solicitor takes any advantage which the possession of the deeds does not confer on him, the lien is gone, unless the right to lien is expressly reserved. Thus, when the judgment was obtained, with its power of generating interest, the possessory lien was lost, unless the inchoate right was preserved. It is necessary to distinguish between the possessory lien, and the charging lien. The earliest case on the subject is *Roberts* v. *Jeffreys* (1), decided sixty-three years ago. It was there held that if a solicitor takes a promissory note for his costs, payable on demand, he loses his lien, the reason of the decision being that, if a solicitor takes a security for his costs, which will, in fact, give him interest, such security is a waiver of the lien. There the solicitor took a joint promissory note of the client and a third party; but Sir J. Leach, M.R., said that if he took the promissory note of the debtor alone it would have had the same result. That case is a clear authority that the taking a security which fructifies—producing interest—is a waiver of the lien, unless preserved. One of the latest cases is *In re Taylor, Stileman, and Underwood* (2), where it was held that the question of abandonment depends on intention, and that, *prima facie*, where a solicitor,

(1) 8 L. J. Ch. (O. S.) 137. (2) [1891] 1 Ch. 590.

whose duty it is to advise his client as to his rights and liabilities, takes from his client a security for costs, without explaining that he intends to reserve his lien, the inference must be drawn that the lien was to be abandoned. Lindley, L.J., says at p. 597 :— "It strikes me that if a solicitor takes from his client such a security as this solicitor took" (*i.e.* a promissory note of the client and her husband) "the *prima facie* inference is that he waives his lien. That appears to me the right and proper conclusion to come to, bearing in mind that it is the solicitor's duty to explain to his client the effect of what he is about to do." Kay, L. J., at p. 601, expressly recognizes the authority of *Roberts* v. *Jeffreys* (1). To the same effect is the decision of Boyd, J., in the recent Irish case of *Re Corry* (2). In *Bissill* v. *Bradford and District Tramways Company* (3), the Court of Appeal in England adhered to *In re Taylor, Stileman, and Underwood* (4). Both these cases show that the burden of proof that there was an intention to reserve the lien lies on the solicitor. The non-interest bearing quality of costs is shown in *Shannon* v. *Casey* (5), see *per* Lord O'Hagan, pp. 317, 318. Costs *qua* costs have no power of generating interest: *Brownlow* v. *Keatinge* (6), decided in 1830. There the Master of the Rolls suggests that there might have been a difficulty if the solicitor had merely taken a security for the amount of the costs, and *nothing more*. What was the "more"? The interest. So, in this case, the solicitor is given a new character and new demands. See also *Ex parte Solomon; In re Aubusson* (7). The text-books are to the same effect: Cordery on Solicitors, ed. 1888, p. 306; Pulling on Attorneys, 3rd ed., p. 379; Adair on Costs, 218, 223, 224. As to the distinction between the possessory lien, and the equitable or charging lien, see Henry on Solicitors' Remuneration, p. 95; *Shaw* v. *Neale* (8). *O'Brien* v. *Lewis* (9), which may be relied on by the other side is distinguishable as being the case of a charging lien.

(1) 8 L. J. Ch. (O. S.) 137.
(2) 27 Ir. L. T. & Solrs. Jour. 566.
(3) W. N. 1893, p. 44.
(4) [1891] 1 Ch. 590.
(5) Ir. R. 8 Eq. 307.
(6) 2 Ir. Eq. R. 243.
(7) 1 Gl. & Jam. 25.
(8) 6 H. L. Cas. 581.
(9) 11 W. R. 973; 32 L. J. Ch. 665.

Monroe, J. 1893.

In re AIKIN'S ESTATE.

Drury, for Mr. Smyth, incumbrancer No. 6, supported the contention of Mr. Cassidy.

Donaldson, for William Caldwell, executor of Archibald Collum :—

It is strange that, during the seventy years which have elapsed since the doctrine of waiver of lien was introduced by Lord Eldon in *Cowell* v. *Simpson* (1), there is no case in which it has been argued that a judgment extinguishes the lien. There judgment was recovered, but the point is neither relied on in the argument nor by Lord Eldon in giving his decision. What was relied on was the giving of promissory notes by the client to the solicitor, and that the special contract thus made superseded the direct lien. I think that is the ground upon which all the cases proceed. The cases cited have no application to hostile proceedings, such as the recovery of a judgment which the solicitor can obtain without any assistance from his client. The very circumstance that these cases proceeded on the ground that the solicitor should have communicated to his client the alteration in their relative positions, which would be effected by taking the security, and that he, the solicitor, did not intend to give up his lien, show that they are distinguishable from the case of a judgment. Surely there is no obligation on the solicitor, when issuing a writ, to instruct the process-server to give such notice to the defendant. The judgment does not give the solicitor more than he is entitled. Taxed costs always bore interest: and also costs where notice was served with the bill that interest would be claimed. In *In re Taylor, Stileman and Underwood* (2) Lord Justice Lindley states expressly (p. 597) the ground of his decision :—" It is the solicitor's duty to explain to his client the effect of what he was about to do. In the case of a banker I should not draw the same inference, since a banker has not a similar duty towards his customer. Bearing in mind the position of the parties . . . . the true inference from the circumstances is that the lien was waived." Therefore, if a solicitor has no duty to give an explanation to his client, the obtaining security does not deprive him of his lien. The assertion

(1) 16 Ves. 275. (2) [1891] 1 Ch. 590.

that it could be the duty of the solicitor to explain the effect of hostile judgment is to carry the argument to an absurdity. Kay, L.J., says, p. 601 :—"A solicitor has a duty to perform towards his client to represent to his client all the facts of the case in a clear and intelligible manner, and to inform him of his rights and liabilities; and where you find a solicitor dealing with his client, and taking from him such a security as was given in this case, not expressly reserving his right to lien, I quite agree that the inference ought to be against the continuance of the lien." In *In re Lumley* (1), North, J., held that obtaining a charging order was not a waiver of lien, and he puts, as an illustration, the very point arising here. He says :—"I do not see anything that would have prevented them" (the solicitors) "from taking any steps that the law allows them for enforcing their claim in that way. By way of illustration: supposing there had been a judgment in a common law action brought by the solicitors to recover the amount that was due on their bill after delivery of the bill, and after the certificate made, it seems to me that, although they had obtained such an order as this, it is a matter of course that they could also if they had pleased have issued execution upon their judgment." *Shaw* v. *Neale* (2) has no application. It was the case of an equitable, not of a retaining, lien. *Ex parte Solomon; In re Aubusson* (3) turns altogether on bankruptcy law and there the solicitor lost his lien by proving for his costs without valuing his security.

As to *O'Brien* v. *Lewis* (4), though the solicitor took his client in execution under a *ca. sa.*, it was held that he had not abandoned his lien. That was the case of an equitable lien. So were *Bawtree* v. *Watson* (5), *Lloyd* v. *Mason* (6), in both of which the client was attached for non-payment. But there are no rational grounds for drawing a distinction in this respect between the equitable and the retaining lien. It is altogether a question of intention. Before the Court can find that the executors gave up their lien, it must find that they entered into some contract, express or implied, to surrender the lien in consideration of some additional benefit.

(1) 37 Solrs. Jour. 83.
(2) 6 H. L. Cas. 581.
(3) 1 Gl. & Jam. 25.
(4) 11 W. R. 973; 32 L. J. Ch. 665.
(5) 2 Kee. 713.
(6) 4 Hare, 132.

Monroe, J. 1893. *In re* AIKIN'S ESTATE.

[MONROE, J.—What would be the effect of giving a consent, for judgment?] In *Cowell* v. *Simpson* (1), the judgment was confessed, and the point was not raised. In the case of an inn-keeper's lien, which is a possessory lien, the question arose in *Jacobs* v. *Latour* (2). It was not contended that the effect of a judgment was to destroy such a lien, but it was held that the giving up of the property by the inn-keeper to the sheriff was an abandonment. Here there was no agreement express or implied to give up the lien. The judgment here had no more effect upon it than a certificate of taxation would have had. Nothing was done inconsistent with the lien.

M'Laughlin, Q.C., in reply:—

There is no authority for the proposition that the lien cannot be destroyed by a proceeding *in invitum*.

Matheson, Q.C., for the owners and petitioners having carriage.

Sheil, for the Hibernian Bank, incumbrancers.

Dec. 8.

MONROE, J. [after disposing of some minor objections, continued]:—

The third and last objection was filed by Mr. Cassidy on the 7th November, 1893. He complains of the priority given by the schedule to Mr. Collum's costs under his alleged lien, and this on two grounds—1, that there was nothing due to Mr. Collum's executor; and 2, that sufficient title was or could have been shown to the lands of Doogarry and Coolback without resorting to the deeds deposited. The answer to the first of these contentions is that it is a matter for vouching; the second contention was never opened by his counsel, and I must take it to have been abandoned.

A few days after the filing of this objection a notice was served by Mr. Cassidy, alleging that Mr. Collum's lien was disputed on another ground. The point raised by this notice is one of considerable importance. The late Mr. Archibald Collum held, at the time of his death, a large number of the owner's title-deeds, on which his executor claims the possessory lien of a solicitor for all costs then due. On the 1st February, 1877, Mr. Collum's

(1) 16 Ves. 275. (2) 5 Bing. 130.

executor commenced an action against the owner to recover the amount of his bill of costs. No defence was taken, and interlocutory judgment was duly marked. By an order of the Court of Queen's Bench it was referred, on consent, to the Master to report what was due, and direction was given that final judgment should be marked for that sum. The Master reported that there was due £378 6*s.* 1*d.*, and final judgment was marked on the 19th July, 1879. The contention on the part of the puisne incumbrancer, Mr. Cassidy, is that the lien is inconsistent with the judgment, and must be taken to have been abandoned. It is necessary, therefore, to consider the ground on which a solicitor's lien has been held to be lost by reason of his taking some further or other security.

One of the first cases in which the matter was fully discussed and adjudicated upon was that of *Cowell* v. *Simpson* (1). There, while the lien of a solicitor existed, he took from his client, for his costs, promissory notes payable with interest three years after date. Nothing was said at the time about the continuance of the lien. Lord Eldon held that the lien was gone. He was disposed to adopt the principle that it was lost by the effect of the intention to substitute the special contract for the implied one. The intention to abandon the lien he gathered from the improbability of the solicitor seeking to withhold the client's papers during the whole time that the three years were running.

In *Roberts* v. *Jeffreys* (2) it was held that, where the solicitor took a promissory note, payable on demand, from the client and another person, the lien was gone, as the new security carried interest, and the solicitor must be held to have abandoned his lien when he got the client to give him this additional advantage. So, in *Brownlow* v. *Keatinge* (3), a solicitor was held to have lost his lien by taking a bond to secure the amount of his costs, with interest at 5 per cent., the Master of the Rolls basing his judgment on the ground that the new security was inconsistent with the continuance of his lien.

The grounds of these decisions and the principle underlying them was very recently discussed by the Court of Appeal in *Re Taylor* (4).

(1) 16 Ves. 275.
(2) 8 L. J. Ch. (O. S.) 137.
(3) 2 Ir. Eq. R. 243.
(4) [1891] 1 Ch. 590.

Monroe, J. 1893. *In re* AIKIN'S ESTATE.

There, while solicitors had a lien on the papers of a married lady, she and her husband gave them joint and several promissory notes for the amount, with interest at 5 per cent., and also a policy of insurance. The lien was held to have been thereby discharged. Lord Justice Lindley put it in this way :—"Whether a lien is waived or not by taking a security depends upon the intention, expressed or to be inferred from the position of the parties and all the circumstances of the case. In this particular instance we are dealing with a solicitor and his client. It strikes me, if a solicitor takes from his client such a security as this solicitor took, the *prima facie* inference is that he waives his lien. That appears to me the right and proper conclusion to come to, bearing in mind that it is the solicitor's duty to explain to his client the effect of what he is about to do. In the case of a banker I should not draw the same inference, since a banker has not a similar duty towards his customer. . . . In the absence of evidence to the contrary, the true inference from the circumstances is that the lien was waived." The view of Lord Justice Lopes is put thus :—"It appears to me that in each case the question whether the lien is waived by taking security must be decided according to the particular circumstances. I do not mean to say that taking a security necessarily imports an abandonment of the lien; but if there are circumstances in the taking of the security which are inconsistent with the continuance of the old security, it is to be inferred that the solicitor intended to abandon his lien."

It will be observed that according to these views the lien is not lost merely by reason of the solicitor taking some additional security. He may, when taking the new security, inform the client that he intends to retain his lien, and he can do so, if the client thinks proper, after such intimation, to give him what he asks. But if the solicitor says nothing about the lien when he asks and receives for his costs a new security, conferring advantages which his right of lien did not give him, the abandonment of the right of lien is assumed to be intended as compensation for the granting by the client of rights which he could not otherwise have obtained. The law is then taken to imply a contract by the solicitor that, if the client gives him the security he asks, all right to retain the papers is given up. Can such a contract or intention on the

part of the solicitor to waive his lien be implied where the solicitor does not go to the client at all?—does not ask him for any additional or other security, but merely pursues such other rights to recover his money as the law gives him? The solicitor may have several modes of getting at his costs. He may have the right of retaining the client's deeds until the costs have been paid, or he may have the ordinary right of suing for his debt given to him in common with other creditors, or of proceeding at law or in equity in other ways. Can it be said that, if the solicitor pursues one of his remedies by action, he loses his right of retaining the title-deeds? What evidence is there to support the contention that the solicitor gives up his lien where he has no intention of asking, and does not ask, the client as a favour to do more for him than he is entitled to. In my opinion there is none. A solicitor holding his client's deeds may obtain a decree of the Court of Chancery for payment of his costs; and such order, by the 3 & 4 Vict. c. 105, s. 27, has the effect of a common law judgment. Can it be contended that such Chancery order destroys the possessory lien? I say, again, it does not. No authority has been cited for such a proposition, and I believe no such authority could be found. Any authority there is, is opposed to the idea. In the old case of *Cowell* v. *Simpson* (1), before Lord Eldon, judgment had been marked by the solicitor against the client; yet neither in the argument nor in the judgment is it suggested that the possessory lien had been thereby affected. In the recent case of *Re Lumley* (2), cited from 37 Solicitors' Journal, p. 83, not apparently reported elsewhere, the solicitors, Messrs. Lumley, held the papers of their client, Mrs. Cathcart. She applied to have them delivered up to her, and relied on the fact that in the month of March, 1892, they had obtained an order for taxation; that the costs had been duly certified; that the solicitors had obtained in July an order for the payment of their costs out of certain stock standing in her name subject to the payment of other charges; and a further order that the costs should be a charge on the residue of the stock, and that the client should transfer sufficient to discharge the claim. Mr. Justice North refused to order the delivery of the papers. He

(1) 16 Ves. 275.
(2) 37 Solrs.' Jour. 83.

Monroe, J. 1893. *In re* Aikin's Estate.

could see nothing, he said, from which he could infer that the solicitors intended to abandon their lien. There was nothing express and there was nothing implied. He could see nothing that would have prevented them from taking any steps that the law allowed them for enforcing their claim. If orders such as those granted for charging on a certain fund the amount of costs due, with interest thereon, were not to be held inconsistent with a possessory lien, I fail to see how such lien must be held to have been waived by entering up a common law judgment.

I therefore overrule the objection.

Solicitors for the owners and petitioners: *William V. & J. Lawler & Co.*

Solicitor for the objector: *O'Riordan.*

Solicitor for William Caldwell: *Henry.*

Solicitors for the Hibernian Bank: *D. & T. Fitzgerald.*

Solicitor for Mr. Smyth: *William Smyth in person.*

W. G.

IN RE PEEL; EX PARTE CROSSLEY, BROTHERS (LTD.).

Bankruptcy.
1893.
Oct. 27.
Appeal.
Dec. 4.
1894.
Feb. 2.

Hiring agreement—Construction—Property in goods—Option to purchase—Bankruptcy—Trade custom—Reputed ownership.

A gas engine was in the possession of a manufacturing cooper, under an agreement which, after describing the parties as "the owners and lessors" and "the lessee," respectively, provided that the lessee should pay to the owners and lessors, as rent, £60 cash before delivery, and the balance between that sum and £210 by eight equal quarterly payments, and that upon payment of the said several sums the agreement should be at an end, and the gas engine should become the property of the lessee as purchaser thereof; but that until the said sums should have been fully paid, with insurance, repairs (if any), and other costs and expenses, legal or otherwise, connected therewith, the engine should remain the property of the owners and lessors; and declared that the engine was only let on hire to the lessee until all sums due under the agreement were paid; and it was further provided that in case of failure in payment of any of the above-mentioned sums, or in case the lessee, during the continuance of the agreement should, *inter alia*, be adjudged a bankrupt, and on the breach of any of the covenants and conditions therein contained, the full balance of £240 should, at the election of the owners and lessors, at once become payable and be recoverable by them; but that instead of seeking to recover such balance they might, if they thought fit, seize and resume absolute possession of the engine, and sell the same, and the several sums which should have been paid by the lessee should be forfeited to the owners or lessors, who out of the purchase-money to arise on any sale, should have power to re-imburse themselves all costs and expenses, and after retaining the difference between the instalments actually paid and the said sum of £240 pay the surplus (if any) to the lessee: provided also that in case the owners and lessors should see fit to resume possession of the engine without proceeding to a sale the loss occasioned to them by the non-performance of the provisions of the agreement on the part of the lessee should be borne by the lessee; and in case of bankruptcy the owners and lessors should be entitled to prove against his estate for the same as and for liquidated damages. A plate with the lessors' name was affixed to the engine, but, in the position which the engine occupied in the bankrupt's premises, this plate could not be seen.

Only one instalment was paid by the lessee, and after several others became due he was adjudicated a bankrupt, the engine being in his possession at the time of such adjudication.

On motion by the lessors to have the engine delivered up to them, waiving any right of proof, the Court being satisfied upon the evidence that there was

Bankruptcy. 1893.

In re PEEL; *Ex parte* CROSSLEY.

a notorious custom of hiring such engines to persons in the trade of the bankrupt:—

Held by the Court of Appeal (Walker, C., and Fitz Gibbon and Barry, L.JJ), reversing the decision of Boyd, J., on the construction of the agreement, that the property in the engine had not passed to the bankrupt.

In construing such agreements, and applying to them the notoriety of trade custom in excluding reputation of ownership, there is no distinction between agreements for the hire of articles of luxury and articles of commerce.

Ex parte Pallester and Son; In re Dunne (25 Ir. L. T. R. 85), approved of and followed.

MOTION on behalf of Crossley Brothers, Limited, for an order that the assignees deliver up to the applicants a gas engine alleged to be their property. It appeared that the bankrupt had become possessed of the engine under an agreement in the following words:—

AN AGREEMENT made this 23rd day of June, one thousand eight hundred and ninety-two, between CROSSLEY BROTHERS (Limited), Engineers, Millwrights, and Machinists, of Openshaw, Manchester, in the County of Lancaster, hereinafter called "The Owners and Lessors," of the one part, and Mr. THOMAS FREDERICK PEEL, Cooper, 6, Cathedral-place, Limerick, hereinafter called "The Lessee," of the other part.

The Owners and Lessors hereby agree to let to the Lessee, and the Lessee hereby agrees to take and hire from the Owners and Lessors one "Otto" Gas Engine of fourteen horse-power, with all fittings and appurtenances, complete, as specified in the trade catalogue of the Owners and Lessors, delivered and fixed complete in Limerick (with self-starter), on the following conditions:—

The Lessee shall and will pay to the Owners and Lessors as and for rent for the said "Otto" Gas Engine, the following sums (that is to say)—£60 (sixty pounds) cash before delivery, and the balance in eight equal and consecutive quarterly payments, which said sums so agreed to be paid as aforesaid amount in the aggregate to the sum of £240 (two hundred and forty pounds); and the Lessee agrees to take all proper care of the said "Otto" Gas Engine, and, so long as any of the said sums remain unpaid, to pay the rent payable by the Lessee in respect of the premises upon which the said Engine may for the time being be, within 14 days after the same may be payable, and on demand produce to the Owners and Lessors the receipt in respect of the same, and to allow plates to be fixed and any number or mark to be put on the said "Otto" Gas Engine, with the name of the said Company as Owners and Lessors thereon, and to allow such Plates, Numbers, and Marks, to remain so fixed and put thereon, and that the Lessee will permit the Owners and Lessors, or their Agent to have access to the said Engine if they should so require, and will not in any way sell, assign, sublet, or otherwise part with the possession of, the

said "Otto" Gas Engine, or assume the Ownership thereof, or remove the same from one building to another without first informing the Owners and Lessors of such intended removal, and receiving their consent in writing so to do, so long as any of the said sums shall remain unpaid, and will not make any alteration or addition to the said "Otto" Gas Engine, or allow the same to be made without the consent in writing of the Owners and Lessors, and that upon payment by the Lessee of the several sums aforesaid, then this agreement shall be at an end, and the said "Otto" Gas Engine shall become the property of the Lessee, as purchaser thereof, for the said sum of £240, so to be paid as aforesaid; but until the said several sums shall have been fully paid, together with insurance, repairs (if any), and other costs and expenses, legal or otherwise, connected therewith, the said "Otto" Gas Engine shall remain the sole and absolute property of the Owners and Lessors, it being hereby expressly declared and agreed that the said "Otto" Gas Engine is only let on hire to the Lessee until all sums of money due under this Agreement are paid, and in case of failure in payment of any of the above-mentioned sums, or in case the Lessee, his executors, administrators, or assigns shall, during the continuance of this agreement, be adjudged bankrupt, or file a petition for liquidation, or make a composition with, or any assignment for the benefit of, his creditors, or suffer his effects to be taken in execution, or give a bill of sale, or on the breach of any of the covenants and conditions herein contained, the full balance of the said sum of £240 required for purchase of the said Engine, shall, at the election of the Owners and Lessors, at once become payable to, and be recoverable by, them, who, however, instead of seeking to recover such balance, may, if they think fit, seize and resume absolute possession of the said Engine wherever the same may be, and for this purpose, if necessary, may break into the premises of the Lessee where the said Engine may from time to time be, or be reasonably thought to be, and sell the same in such way as they may think fit, and the several sums which shall have been paid by the Lessee shall be forfeited to the Owners and Lessors, and out of the purchase-money to arise from any sale of the said "Otto" Gas Engine, the Owners and Lessors may reimburse themselves, and pay all the costs and expenses incurred in such seizure and sale, or in connexion therewith, and after retaining the difference between the instalments so actually paid by the Lessee under the provisions aforesaid, and the said sum of £240, pay the surplus, if any, unto the Lessee, his executors, administrators, or assigns, or to whom he or they shall direct. Provided always, and it is hereby agreed and declared that in case the Owners and Lessors shall see fit to resume the possession of the said "Otto" Gas Engine under this agreement without proceeding to a sale, then the loss occasioned to them by reason of the non-performance of the provisions of this agreement on the part of the Lessee shall be borne by the Lessee, and in case of bankruptcy, the Owners and Lessors shall be entitled to prove against his estate for the same, as and for liquidated damages. And, lastly, it is hereby agreed that the Owners and Lessors shall insure the above "Otto" Gas Engine

Bankruptcy. 1893. *In re* PEEL; *Ex parte* CROSSLEY.

against damage by fire, for the sum of £240, for their own security, the premium for the same being paid by the Lessee; but in case of fire, if the sum received shall be over the balance of the said sum of £240 then remaining unpaid to the Owners and Lessors, the surplus shall be paid to the Lessee.

In witness, &c.

Only one instalment was paid by the bankrupt. There had been some correspondence between the bankrupt and the managers of the Company, but there was not in the opinion of Boyd, J., any demand by the Company for delivery up of the machine prior to the present application. There was a plate on the engine with the name "Crossley Brothers, Limited," but the engine was so placed in the bankrupt's premises that the plate was not visible.

Blood, for the Crossley Co., in support of the application:—

The custom of hiring with option of purchase is sufficiently notorious, and has been held applicable to preserve the hirer's rights in the case of a great variety of articles: *Ex parte Watkins; In re Couston* (1), where all the authorities up to that date will be found reviewed. The terms of the present agreement do not materially differ from *Ex parte The Singer Sewing Machine Manufacturing Co.; Re Blackwell* (2); *Ex parte Pallester & Son; In re Dunne* (3). The latter case is quite undistinguishable. We are willing, as the applicants there did, to abandon any claim for damages: *In re M'Manus* [before Miller, J., unreported].

W. Kenny, Q.C., and *R. Doyle*, for the assignees:—

The Company, by this agreement, reserved to themselves the right to prove for future instalments. The relation between the parties was not that of lessor and lessee, but that of vendor and purchaser, with a prescribed mode of payment by instalments. The tendency of the Courts has been against these hiring agreements: see observations of Miller, J., in *Ex parte Pallester & Son; In re Dunne* (3). In *The Singer Company's Case* (2), the person to whom the machine was hired was given by the agreement in express words the option of purchase. In every proper hiring agreement there must be mutuality, either express, as in *The Singer Company's Case* (2), or to be inferred from the terms of the

(1) L. R. 8 Ch. App. 520. (2) 12 Ir. L. T. R. 57. (3) 25 Ir. L. T. R. 85.

agreement. Either party should be given a power of putting an end to the hiring. Here, Peel could not have determined the contract without incurring liability. In case of failure to pay any instalment the full balance of £240 is made recoverable; or they can seize the engine and sell; or they may take back the engine and not sell, and then the loss occasioned to them by reason of the non-performance of the provisions of the agreement are to be borne by Peel or his estate. This loss must mean the unpaid instalments less by the value of the engine at the time of resuming possession. These clauses show that the instrument of the 23rd June, 1892, was an agreement for sale *ab initio*. But if the Company had power to resume possession they were bound to elect whether they would do so or not within a reasonable time after the right accrued, *i.e.* after an instalment was left unpaid. The second instalment fell due on the 23rd December, 1892, and was left unpaid.

We rely upon the Company's laches as evidence of their election to treat the bankrupt as a purchaser.

Blood, in reply, referred to *Re Lock; Ex parte Poppleton* (1).

BOYD, J.:—

I have come to the conclusion on the whole of the argument that this is an agreement in reality for the purchase and sale of the machine and not for the hire of it. Even if Judge Miller had not expressed the opinion he has done in *Ex parte Pallester; In re Dunne* (2), I would be prepared to say that these hiring agreements are not in the interests of trade, so far as articles of trade are concerned. I think there is a broad distinction between hiring articles of trade and articles of luxury, such as pianos, bicycles, &c., many of which, it may be well supposed, are let out on hire. Many people cannot afford to buy these articles of luxury, and would be deprived of their enjoyment if they were not able to procure them on hire. Many young men would be unable to enjoy a ride in the country on a bicycle if they were not for hire under these agreements. But when it comes to every-day commerce—to all kinds of articles of trade—if you once open the system to these,

(1) 63 L. T. (N. S.) 839. (2) 25 Ir. L. T. R. 85.

Bankruptcy. 1893. *In re* PEEL; *Ex parte* CROSSLEY. Boyd, J.

where is the line to be drawn? Everything in a tradesman's shop may be let to him under the system, and no one could say what were his own goods or what belonged to him.

I do not place much stress on the Crossleys not asking for the machine. They relied on the agreement when writing. They have all through relied on the agreement. In my opinion a cardinal point in a true hiring agreement is that there must be an option on the part of the hiree to terminate the agreement with him; but in the agreement now in question the hiree has no option. You can hire a horse by the week or the month. At the end of the week or month there is an end of the hiring. And further, if the article hired is of a kind which will be necessarily deteriorated, to the extent of such deterioration the hirer is compensated by the amount paid for the hire. But here there is no option to the hiree to give the machine back. The moment he took the machine into his custody, that moment he was bound to pay the £240, and from that date he could not get rid of it. He was bound to retain the machine, whether he liked it or not. According to the agreement, he had no right to do anything with the machine except to keep it in order, insure it, and pay the instalments. Then comes this extraordinary provision in it—certainly not in the interests of trade—that, if every instalment was paid but one, the Crossleys could take possession and prove for that one instalment in bankruptcy. The words are "the loss occasioned to them by reason of the non-performance of this agreement," and the only loss under the agreement would be the non-payment of the purchase-money.

On the whole case, and on the best opinion I can form, I have come to the conclusion that the agreement was one for sale and purchase in its true character and not a hiring agreement.

W. G.

Appeal. Dec. 4.

Messrs. Crossley appealed to the Court of Appeal (1).

Several affidavits were filed on behalf of the appellants and two on behalf of the respondents, giving evidence as to the exis-

(1) Before WALKER, C., and FITZGIBBON and BARRY, L.JJ.

tence of a custom of hiring out "Otto" gas engines on agreements like that under which Peel procured the engine from the appellants. The effect of this evidence is stated in the judgment of the Lord Chancellor.

Appeal. 1893. *In re* PEEL; *Ex parte* CROSSLEY.

Carton, Q.C., and *Blood* for the appellants.

Kenny, Q.C., *Campbell, Q.C.*, and *R. Doyle*, for the respondents.

WALKER, C.:—

1894. Feb. 2.

This is an appeal from an order of Judge Boyd. Thomas F. Peel was adjudicated a bankrupt on the 30th June, 1893, and at the date of his adjudication he had in his possession for the purposes of his trade, which was that of cooper, an "Otto" gas engine. This possession was under the terms of an agreement, dated 23rd June, 1892, made between him and the appellants, Crossley Brothers, of Manchester, engineers. Messrs. Crossley applied to Judge Boyd that the engine should be delivered up to them by the assignees, on the ground that the bankrupt was not reputed owner thereof, and that the engine was not in the order and disposition of the bankrupt at the time of his bankruptcy with the consent of the applicants as true owners. Judge Boyd refused the motion, and ordered that the engine should be sold for the benefit of the creditors.

The appeal raises two questions:—First, Whether there is sufficient proof of a notorious custom for the hiring out of these gas engines, *i.e.* a custom so long and extensively acted on as to be known by or rather to have knowledge of it imputed to the ordinary creditors of the bankrupt, and so to negative reputed ownership from possession; and, secondly, what are the rights of the parties under the agreement of 23rd June, 1892?

Judge Boyd rested his view entirely on the construction of the agreement. I shall dispose first of the question whether there is sufficient proof of the existence of such a notorious custom as I have described. In the Court below, evidence of the custom of hiring out those machines on fixed terms, with the right of resumption of possession on bankruptcy, was given only by two witnesses—Mr.

Appeal. 1894. *In re* PEEL; *Ex parte* CROSSLEY. Walker, C.

Crabtree, the agent of appellants, and Mr. Salmon, of Woodley Iron Works, near Stockport, a printing machine maker. For the purposes of the appeal a number of affidavits have been filed — eleven on behalf of the appellants—eight of them by gentlemen representing similar trades in different parts of England, one by a Dublin trader, and another by a Limerick gentleman, a druggist, who all deposed to the prevalence and notoriety of the custom in England and Ireland. Mr. Irwing, the cashier of appellants, proved that they had twenty-two gas engines let out in Ireland on the hire and purchase system, besides hundreds in England. This evidence was only encountered by the affidavits of two witnesses—a Mr. O'Brien, and a cooper named Cronin, who deposed that they had never known or heard of the custom.

The doctrine of the Court on this branch of the law of reputed ownership has been settled since the case of *Ex parte Watkins* (1) by the judgment of Lord Selborne :—"The doctrine of reputed ownership does not require any investigation into the actual state of knowledge or belief, either of all creditors, or of particular creditors, and still less of the outside world, who are no creditors at all, as to the position of particular goods. It is enough for the doctrine if those goods are in such a situation as to convey to the minds of those who know their situation the reputation of ownership—that reputation arising by the legitimate exercise of reason and judgment on the knowledge of those facts, which are capable of being generally known to those who choose to make inquiry on the subject. It is not at all necessary to examine into the degree of actual knowledge which is possessed, but the Court must judge from the situation of the goods what inference as to the ownership might be legitimately drawn by those who knew the facts. I do not mean the facts that are only known to the parties dealing with the goods, but such facts as are capable of being, and naturally would be, the subject of general knowledge to those who take any means to inform themelves on the subject. So, on the other hand, it is not at all necessary, in order to exclude the doctrine of reputed ownership, to show that every creditor or any particular creditor, or the outside world who are not creditors, knew

(1) L. R. 8 Ch. App. 528.

anything whatever about particular goods one way or the other. It is quite enough, in my judgment, if the situation of the goods was such as to exclude all legitimate ground from which those who knew anything about that situation could infer the ownership to be in the person having actual possession;" and Lord Justice Mellish, in the same case, lays down a principle which entirely commends itself to my judgment:—"I must also say that I think it extremely desirable that as far as can be done reasonably and consistently with the rules of law, the law should be so interpreted as to be in accordance with the customs of trade. To make the law needlessly conflict with the custom of any trade causes the greatest inconvenience and injustice to persons in that trade."

The doctrine has been applied to whisky in bonded store in the name of a bankrupt; to pianos sold on the three years' system; to sewing machines; to furniture bought for a hotel; to portable steam engines used by timber merchants, and to printing machines; and there would seem to be no reason why a cooper should not have, under the same system, the possession of an engine like an "Otto" gas engine, which resembles in character a portable steam engine and printing machine. I think, therefore, there is sufficient proof of the custom within the authorities.

The assignees, however, mainly rested their case upon the other ground—that on which Judge Boyd founded his order, viz. that the agreement of 23rd June, 1892, was in reality an agreement for purchase, vesting the property in the bankrupt at once, or at all events when the first instalment became overdue; and that it was unreasonable and contrary to the policy of the bankruptcy laws. In fact, only one of the stipulated payments was made, and there were several instalments due at the date of the bankruptcy. It would seem strange if we were to find in the agreement of 23rd June language sufficient to vest in Peel the property before all the instalments were paid—a purpose which it was manifestly the object of the transaction to prevent. This renders it necessary to consider carefully the language of the agreement. It contains, amongst others, the following provisions:—The owners and lessors hereby "agree to let, and the lessee agrees to take and hire from the owners and lessors an 'Otto' gas engine, &c., on the following conditions:—The lessee shall and will pay to the owners and

Appeal. 1894. *In re* PEEL; *Ex parte* CROSSLEY. Walker, C.

lessors as for rent for the said 'Otto' gas engine the sums following, that is to say, £60 cash before delivery, and the balance in eight quarterly payments, which said sums so agreed to be paid amount in the aggregate to £240; and the lessee agrees to take all proper care of the said 'Otto' gas engine, and so long as any of the said sums remain unpaid, to pay the rent payable by the lessee in respect of the premises upon which the said engine may for the time being be, &c.; and to allow plates to be fixed, and any number or mark put upon the said 'Otto' gas engine, with the name of the said Company as owners and lessors thereon, &c.; and that the lessee will permit the owners and lessors or their agent to have access to the said engine if they should so require, and will not in any way sell, assign, sublet, or otherwise part with the possession of the said 'Otto' gas engine, or assume the ownership thereof, or remove the same from one building to another without first informing the owners and lessors of such intended removal, and receiving their consent in writing so to do, so long as any of the said sums shall remain unpaid; and will not make any alteration or addition to the said 'Otto' gas engine or allow the same to be made without the consent in writing of the owners and lessors; and that upon payment by the lessee of the several sums aforesaid, then this agreement shall be at an end, and the said 'Otto' gas engine shall become the property of the lessee *as purchaser* thereof for the said sum of £240 so to be paid as aforesaid; but until the said several sums shall have been fully paid, together with insurance, repairs (if any), and other costs and expenses, legal or otherwise, connected therewith, the said 'Otto' gas engine shall remain the sole and absolute property of the owners and lessors, it being hereby expressly declared and agreed that the said 'Otto' gas engine is only let on hire to the lessee until all sums of money due under this agreement are paid;" and in case of failure in payment of any of the instalments, or the bankruptcy of the lessee, or his effects being taken under an execution or his giving a bill of sale, the agreement provides that certain rights arise:—"The full balance of the said £240 required for the purchase of the said engine shall at the election of the owners and lessors at once become payable to and be recoverable by them." But "instead of seeking to recover such balance they may, if

they think fit, seize and resume absolute possession of the said engine." They may either sell the engine or not as they think fit, the several sums which shall have been paid by the lessee being in any event forfeited. If the lessors sell they may retain the difference between the sums paid and the £240. But they may retain the engine without selling, and if they do, "then the loss occasioned to them by reason of the non-performance of the provisions of this agreement on the part of the lessee shall be borne by the lessee, and in case of bankruptcy the owners and lessors shall be entitled to prove against his estate for the same as and for liquidated damages." This last clause would also, I think, raise a serious question if such proof were made whether the property would not vest. But reading the entire document, I am of opinion that the one leading object in this agreement is that till the appellants get the £240 the property shall be in them, and that the possession may be resumed when the events provided for happen, all the instalments paid in the *interim* being forfeited. In all these cases the terms are extremely stringent. It is natural they should be when the great security of the possession has been parted with.

Let us see now how far decided cases present features common to the present. I shall only refer to a few of them:—In *Ex parte Blanshard* (1), the agreement for the hire of the piano was not so stringent as the agreement in this case, but there was the same right to take possession on bankruptcy, though instalments had been paid, and the same forfeiture of past paid instalments existed, and the owner of the piano had allowed the instalments to fall into arrear. Bacon, C.J., said it was unimportant "whether Messrs. Hathersley have, by neglecting to take possession of the piano when default was first made in payment of the instalments, forfeited their rights, because if the custom is valid, the agreement for hire is also valid"; and he also dealt with an argument advanced in the present case, viz. that the agreement was an evasion of the bankruptcy law. He says:—"If the custom is clearly established, then the agreement is no evasion of the bankruptcy law, but a protection and security to the maker of the piano that the bankruptcy law shall not step in and deprive him of his right against

(1) 8 Ch. Div. 601.

Appeal. 1894. *In re* PEEL; *Ex parte* CROSSLEY. Walker, C.

the general body of creditors;" and he answers the point about the forfeiture by saying, "this stipulation for forfeiture is simply in the nature of a penalty, against which, on due cause being shown, relief might be obtained elsewhere."

Ex parte Crawcour (1) was a case of hiring and conditional sale of furniture, the payments being made by instalments, with a stipulation negativing any right to property in the hirer till all instalments were paid. Promissory notes were given for the total amount of the instalments, and it was stipulated that, if the goods were seized by Crawcour under the terms of the agreement, the notes, or such of them as were current, should be void. Lord Justice James pointed out that Crawcour might have got the whole purchase-money by negotiating the notes. It was contended that the agreement passed the property to Robertson the hirer, and that he mortgaged it to Crawcour as collateral security for the notes. Brett, M.R., says:—"In my opinion the property did not pass by the agreement. To hold that it did would be clearly contrary to the expressed intention of the parties. Nor do I think that the property passed by the delivery of the goods, which was made in accordance with the agreement. In my opinion the property could not pass until all the instalments had been paid."

In *Ex parte Stooke* (2), Bampfield, who was a timber merchant, had hired a portable steam engine; the engine had a plate on it bearing the owners' name; the hiring was for three years at ten guineas a month, Bampfield "to be entitled to possession so long as he keeps his payments regular, and in all other respects fulfils this agreement; and if he so fulfils it, the engine to be his property at the expiration of the said term, without further payment, and in the meantime Barrows and Stewart's name as owners to remain on the engine. If Mr. Bampfield shall fail to perform this agreement Messrs. Barrows and Stewart shall be at liberty (without giving any notice) to take and carry away the aforesaid engine, without being liable or answerable for any damages or consequences arising therefrom." The plate bearing the owners' name was on the smoke-door of the engine. At one time, while in possession of Bampfield, his plate was covered over by a plate bearing

(1) 9 Ch. Div. 420. (2) 20 W. R. 925.

the bankrupt's own name. It was argued that the agreement was merely an agreement for sale and not for hire, and gave only lien for unpaid instalments to Barrows and Stewart. But Bacon, C.J., came to the opposite conclusion. He says :—"The custom of the particular trade having been proved, the agreement of the 16th June, 1870, is clear and distinct in its terms, and raises no question either of lien or of bill of sale. The agreement in effect is this :—A hiring agreement at so much rent, accompanied with the understanding that when so much rent shall have been paid the transaction shall be deemed a purchase. Besides, the engine had a plate screwed on to it in a conspicuous place, with the names of the makers upon it, and describing them as owners. The bankrupt could gain no credit by having such an engine, under such circumstances, in his possession. If the plate had been fraudulently covered over and concealed, the question might have been differently decided."

In the present case—something like *Ex parte Stooke* (1)—there was a plate on the engine describing it as the property of Crossley, Limited, Manchester, but it was on the side of the engine, away from the door, and so as not to be visible to a person entering the shop. It was stated that this was due to the pully being erected on that side of the engine.

In *Pallester's Case* (2), the existence of a custom for printing-machine makers to hire out to operative printers printing machines, under agreement enabling them to resume possession was found and established. Miller, J., who decided that case, makes some very apposite remarks on the policy of recognizing these hiring agreements. The learned Judge points out that, as a matter of public policy, the most numerous but least opulent class of those engaged in trade, *i. e.* operative traders, the life blood of all commerce in these countries, from which the less numerous class of more successful merchants is from time to time recruited, is entitled to have extended to them the fostering aid which is afforded by well-regulated and reasonable systems of obtaining goods on hire, with deferred payments, commodities which may be regarded as indispensable tools of trade, and which could not

(1) 20 W. R. 925. (2) 25 Ir. L. T. R. 85.

Appeal. 1894.

In re PEEL; *Ex parte* CROSSLEY

Walker, C.

otherwise be obtained. But the learned Judge also points out that on the other hand the true interest of trade requires that such a system must be kept within the bounds of reasonableness, so as not to confer on traders an amount of credit to which they would not otherwise be entitled, and that it is in this respect alone that a system of hiring out, with deferred payments, comes into conflict with the bankruptcy laws. On the facts deposed to in *Pallester's Case* (1) the learned Judge concludes that "the existence of a custom to the extent of the hiring out to 'operative printers' printing machines for the purposes of carrying on their trades with proper provision relating to deferred payments in respect to such hiring, accompanied by a power, in the event of the subsequent bankruptcy of the hirer, to resume possession of the printing machines thus hired out, has been established;" and he then says, "when such a custom has been established to that extent, it follows that the agreement for the hiring of the printing machine in question to the same extent to which it has been established is necessarily sustained, and in such case the question of order and disposition under the statute would not have arisen, or be applicable, inasmuch as, although it would be true that the printing machine remained in the possession of the bankrupt up to the time of his adjudication, yet I must hold that such possession was controlled by the terms of the written agreement for hiring to that extent, when the ownership of the assignees in right of the bankrupt arose." Taking up the agreement in that case, and going through it, I can see no difference between it and the agreement here. It contained a clause "that in case the lessors shall see fit to resume the possession of the said printing machine under the agreement, without proceeding to a sale, then the loss occasioned to them by reason of the non-performance of this agreement on the part of the lessee shall be borne by the lessee, and in case of bankruptcy the lessor shall be entitled to prove against the estate for the same as and for liquidated damages." The way the difficulty created by that clause was got over was this: Mr. Blood, who appeared for the owners of the printing machine, at the bar waived this provision regarding liquidated

(1) 25 Ir. L. T. R. 85.

damages, and then, upon proof of the custom, the Judge was enabled to declare the owners entitled to the machine.

Pallester's Case (1) seems to me a direct authority in favour of the appellants, and Mr. Campbell met it by contending that it should be overruled. I do not follow the distinction which Judge Boyd took between articles of luxury and articles of commerce. The interests of trade seem to me quite as much concerned in enabling an operative cooper to acquire under agreements such as exist in this and *Pallester's Case* (1) an expensive engine for his trade as enabling a gentleman to buy a piano. The respondents also rely on there being no option on the part of the hirer to terminate the agreement. But that element equally existed not only in *Pallester's Case* (1), but in other cases which were referred to during the argument.

It is true the agreement of 23rd June, 1892, gives large powers of enforcing payment of the full sum of £240. I think that whenever or by whatever means that takes place the property ceases to be Crossley's and becomes the property of Peel. The appellants have not proved in bankruptcy, and waive all right of proof as was done in *Pallester's Case* (1).

Upon the whole case, I am of opinion that *Pallester's Case* (1) rules the present, if it be good law, and I think it is. I cannot come to the conclusion that the property passed where, upon the whole agreement—and I am bound to construe it as a whole—that result would be contrary to the expressed intention of the parties, and, in the words of Lord Justice Mellish, I think it desirable that, so far as is consistent with rules of law, the law should be so interpreted as to be in accordance with the customs of trade.

The appeal will be allowed, and an order made, in the terms of the notice of the appellants in the Court below, for delivery up to them of the engine, the appellants waiving all rights of proof.

FITZ GIBBON, L. J.:—

I concur. In my opinion, the custom of manufacturers taking gas engines on hiring agreements is quite as satisfactorily proved as was the analagous custom, recognised by English authority, of hotel-keepers having hired furniture in their hotels.

(1) 25 Ir. L. T. R. 85.

Appeal. 1894. *In re* PEEL; *Ex parte* CROSSLEY. Fitz Gibbon, L.J.

As between articles used for the purposes of trade or manufacture and articles of luxury, I can see no distinction of law, fact, or principle, leading to any preference for hiring agreements relating to the latter. If the policy of the law can make any difference, it would, I think, incline rather the other way, for it is more important to facilitate the employment of motive power and like advantages for productive purposes, than to encourage the hiring of articles of luxury by people who cannot afford to buy them.

The principle on which these agreements are recognised is one of growing application, and it must develop with the development of the manifold arrangements which commercial enterprise produces. The law relating to goods in the reputed ownership of a bankrupt is founded on deceit—the false inducement to give credit—and under the older and simpler forms of purchase the property in chattels generally went with the possession. But once it becomes known to people who give credit, through a recognised alteration in the usages of commerce, that any particular class of moveables on any person's premises, probably are not his property, then it becomes plain that the apparent possession of such articles can no longer be a ground for giving credit. *Cessante ratione cessat ipsa lex.*

The appellants did nothing in this case which can be treated as wilfully or negligently contributing to Peel's obtaining false credit. The machine was one of an expensive kind, which might reasonably be expected to be, and (as was proved) is frequently, hired for use by small manufacturers, to supply motive power. The small matter of the name on the iron plate being accidentally turned next to the wall—in the absence of fraud—is wholly immaterial, and the machine was sent out by the appellants with a badge of their ownership upon it, which remains there still. It does not appear that anyone giving Peel credit was likely to have seen the machine at all.

I am satisfied that the agreement was intended to be a hiring agreement ending in a sale. If and when the conditions were fulfilled, the property was to pass to Peel, and an option was given to the vendors or hirers at any time, in a certain event, to treat the property as having passed. This option was never

exercised, and therefore at the date of the bankruptcy the conditional hiring was still existing, and the property was still in the appellants.

It is objected that the intending purchaser had no option to give the machine back. It appears to me that the absence of such an option is immaterial. What Peel wanted was to buy the machine, and to become the owner out-and-out: he was able to hire it on terms which secured that, on payment of the instalments, the property was to become his; but in the meantime he was only working his way towards becoming the owner. This is the principle of the "three years system." It is the principle on which a great part of the land in Ireland is being at present transferred to so-called "purchasing tenants." The protection of such agreements is in favour of commerce and the development of industry. The case appears to me to present no substantial difference from *Ex parte Pallester; In re Dunne* (1), which I think was rightly decided; and I think it is to be regretted that the decision of the co-ordinate Judge was not followed.

BARRY, L. J., concurred.

Solicitors for the appellants: *William Findlater & Co.*
Solicitor for the assignees: *J. Rose Byrne.*

G. Y. D.

(1) 25 Ir. L. T. R. 85.

Monroe, J. 1893. Nov. 27. Dec. 5.

In the MATTER of the ESTATE of RICHARD NUNN, Owner; ELFRIDA NUNN, Petitioner.

Probate duty—Insufficient amount paid—Estate fully administered—Claim by Commissioners of Inland Revenue for additional duty—Customs and Inland Revenue Act, 1881 (44 & 45 *Vict. c.* 12)—*Merger of charge by will.*

An executor, by mistake, paid an insufficient amount of probate duty, fully administered his testator's estate, and died:—

Held, applying *Attorney-General* v. *Smith* ([1892] 2 Q. B. 289; [1893] 1 Q. B. 239), that the Inland Revenue had no remedy for additional duty under the Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12).

A testator, by his will, directed that certain charges vested in him should merge in his real estate:—

Held, that probate duty was payable on the charges.

Motion by the petitioner to set aside a claim by the Commissioners of Inland Revenue to be placed on the final schedule of incumbrances for additional probate duty in respect of two charges of £26,460 and £4300, which had been vested in Edward Westby Nunn in his lifetime. The circumstances under which the claim was made, and the grounds on which it was resisted, will be found fully stated in the judgment of Mr. Justice Monroe.

T. Wall (with him, *The Attorney-General*), for the Commissioners of Inland Revenue:—

The Court of Appeal while holding that the charges were only subsisting to a limited extent were clearly of opinion that there was no merger during the life of Edward Westby Nunn, that the question was one of construction on his will, and that the operation of the will was only to effect their extinguishment upon the death of the testator. The medium by which the extinction was to take place was an instrument which did not become operative until then: *In re Nunn's Estate* (1). Probate duty is payable upon charges vested in the owner of the freehold, even though held to

(1) 23 L. R. Ir. 296.

be merged as between the devisee and next-of-kin: *Swabey* v. *Swabey* (1). Duty attaches to all personal estate: *Lord* v. *Colvin* (2); *Shepheard* v. *Beetham* (3). When a debt is forgiven it is regarded as part of the assets for the purpose of duty. The duty attaches on the estate of the deceased at the time of his death: *Attorney-General* v. *Partington* (4); *Bell* v. *Master in Equity of the Supreme Court of Victoria* (5); *Attorney-General* v. *Rathdonnell* (6); *Attorney-General* v. *Brunning* (7); *Attorney-General* v. *Hubbuck* (8), adopted by the Court of Appeal in *Attorney-General* v. *Marquis of Ailesbury* (9); *Attorney-General* v. *Murray* (10). A Court having the control of funds subject to duty will at all times prevent the evasion of payment: *Christian* v. *Devereux* (11); *Lessee of Harding* v. *M'Namara* (12); *Hicks* v. *Keat* (13).

Twigg, *Q.C.*, and *Morphy*, for the petitioner:—

The Crown have referred to cases in which the Judges were administering the whole estate. But probate duty is never payable out of a specific legacy unless the general assets are insufficient. Lorenzo Nunn, the executor of Edward Westby Nunn, had ample assets to meet any demand of the Crown. There is no section attaching probate duty to any property but assets in the hands of an executor. There is not a single case amongst all which have been decided upon the subject of merger in which a claim similar to that of the Crown here has been sought to be established. They are seeking to recover probate duty as attaching to something which is non-existent. The test put in *Attorney-General* v. *Brunning* (7) is whether this is a charge recoverable by the executor under the probate. No one contends that these charges could be recovered. Probate duty is payable solely and individually by the person who takes out administration or probate. Legacy and succession duty differ from it, the one attaching upon the legacy, and the other on the real estate. As long as the administration of

(1) 15 Sim. 106, 502.
(2) L. R. 3 Eq. 737.
(3) 6 Ch. Div. 597.
(4) 1 H. & C. 457.
(5) 2 App. Cas. 560.
(6) 32 L. R. Ir. at p. 596.
(7) 8 H. L. Cas. 243.
(8) 13 Q. B. Div. 275.
(9) 12 App. Cas. 672.
(10) 20 L. R. Ir. 124.
(11) 12 Sim. 264.
(12) 4 Ir. L. R. 190.
(13) 3 Beav. 141.

Monroe, J. 1893. *In re* NUNN'S ESTATE.

the personal estate continues the personal representative is bound to pay the duty, but as soon as he has distributed the estate nobody is bound to pay. The petitioner's title does not depend on the probate; she could have established her case without producing the probate. In *Attorney-General* v. *Smith* (1), affirmed on appeal, it was expressly held on the construction of the 44 & 45 Vict. c. 12, s. 32, that the claim must be made during the administration of the assets, and that when the administration is completed the liability ceases. The additional stamp is to be put upon the corrective affidavit, which is to be made by the person acting in the administration of the personal estate: 44 Vict. c. 12, ss. 31, 32, 37.

The question whether there was a merger in the lifetime of Edward Westby Nunn was not decided by the Court of Appeal. For the disposal of the case before them it was sufficient to show that the will, coupled with the other circumstances, extinguished the charges. It is a question of evidence upon all the acts of Edward Westby Nunn—upon all the circumstances up to his death: *Lindsay* v. *Earl of Wicklow* (2); see judgment of Sir Edward Sullivan, M.R., pp. 204, 205; *Lysaght* v. *Lysaght* (3); *Astley* v. *Milles* (4).

Swabey v. *Swabey* (5) is entirely distinct: first, it was an administration action, and the funds were being administered by the Court; secondly, the houses had been released, but not the obligation to replace the stock; there was therefore an equitable debt due to the trustees of the settlement, and the only question was whether the testatrix intended that the debt should also be released: *Monck* v. *Monck* (6).

Wall, in reply:—

Astley v. *Milles* (4) was cited in *In re Nunn's Estate* (7), and disregarded. As to *Lysaght* v. *Lysaght* (3), we admit that an election might be made in the lifetime of the owner that merger should take place. But in this case there is no evidence of such an intention on the part of Edward Westby Nunn. The intention is

(1) [1892] 2 Q. B. 289; [1893] 1 Q. B. 239.
(2) Ir. R. 7 Eq. 192.
(3) 4 Ir. Jur. (O. S.) 110.
(4) 1 Sim. 298.
(5) 15 Sim. 106, 502.
(6) 1 Ba. & Beat. 298.
(7) 23 L. R. Ir. 286, 296.

all the other way. We rely upon *Swabey* v. *Swabey* (1) as a distinct authority that probate duty would be payable even though the charge became extinguished immediately on the death of the testator. It is an authority unquestioned for over fifty years. *The Attorney-General* v. *Smith* (2) only applied to proceedings under section 32 of the 44 & 45 Vict. c. 12, and leaves other remedies against the executor untouched: *Attorney-General* v. *Darell* (3).

Monroe, J. 1893. *In re* NUNN'S ESTATE.

MONROE, J.:—

On and prior to the 13th October, 1877, when he made his will, Edward Westby Nunn was entitled, as owner in fee, to considerable real estates. He was also entitled to charges on these estates, one of £26,460, which he had mortgaged to secure £12,000, and one of £4300, which he had incumbered to secure an annuity of £100. It may be assumed that prior to the making of his will the charges had not merged in the lands, and it must also be taken, according to the judgment of the Court of Appeal in *Nunn's Estate* (4), that after the making of the will, the sum of £26,460 subsisted as a charge on the estates only for the purpose of securing £12,000 and interest; and the sum of £4300 subsisted as a charge only for the purpose of securing the £100 annuity.

Dec. 5.

Edward Westby Nunn died on the 10th July, 1881, having appointed Lorenzo N. Nunn his executor. The executor made an affidavit for the purpose of obtaining probate, on the 14th July, 1882, and thereby assessed the value of the assets for the purpose of duty at £2577 1*s.* 7*d.* Probate was granted shortly after. No evidence was given on the hearing of this motion as to the administration of the assets by the executor, but the argument proceeded throughout on the assumption that the executor is long since dead, and that the personal assets have been fully administered. The charges were treated by the executor as merged in the real estate, so far as the testator could merge them, and no duty was assessed on them as outstanding personal estate.

(1) 15 Sim. 106, 502.
(2) [1892] 2 Q. B. 289; [1893] 1 Q. B. 259.
(3) Ir. R. 6 C. L. 491.
(4) 23 L. R. Ir. 296.

Monroe, J. 1893.

In re NUNN'S ESTATE.

On the 26th February, 1887, a petition was presented by Elfrida Nunn claiming part of a charge of £35,000 created by the will of Edward Westby Nunn for sale of the estates. An order for sale was duly made. Part of the estates have been already sold. The priority of the several incumbrances has been ascertained and allowed on the schedule, and sums have been already paid on account. The schedule was ruled in the month of April, 1893, and on the 26th July, 1893, the Commissioners of Inland Revenue made claim for additional duty on the £26,460 and £4300. This claim, making allowance for the mortgage thereon of £12,000, and the £100 annuity, was duly verified by Mr. Freeth, and lodged on the 25th October. The present motion is to set aside this claim.

It is contended on behalf of the owners and incumbrancers on the estate:—1, That even if sufficient duty had not been paid the Inland Revenue cannot now make claim to any portion of the real estate; and 2, that probate duty was not, under the circumstances, payable on the charges. It was contended on behalf of the Inland Revenue that they are at liberty to come in at any time, and make claim for duty, while property of the testator is being administered in the Court; that a probate insufficiently stamped cannot be admitted in evidence or used until the additional duty is paid, and that the right to duty on the charges had attached before they became merged in the lands.

The claim for additional duty is made pursuant to the provisions of 44 & 45 Vict. c. 12. By that statute the duty formerly payable upon probates of wills is abolished, but it enacts that corresponding duties shall be charged, in the shape of stamp duties, upon the affidavits required from those applying for probate. No probate can be granted (sect. 30) unless the same bear the certificate, in writing, under the hand of the proper officer of the Court, showing that the affidavit for the Commissioners of Inland Revenue has been delivered, and that such affidavit, if liable to stamp duty, was duly stamped, and stating the amount of the gross value of the estate or effects, as shown by the account. The statute further provides (sect. 31) that if at any time after the grant of probate, and during the administration of the estate, the value mentioned in the certificate shall be found to exceed the

true value of the personal estate and effects, it shall be lawful for the Commissioners to return the amount of duty overpaid; and it further provides (sect. 32) that if at any time it shall be discovered that the personal estate and effects of the deceased were, at the time of the grant of probate, of greater value than that mentioned in the certificate, the person acting in the administration of the estate and effects shall, within six months after the discovery, deliver a further affidavit, with an account, to the Com-Commissioners of Inland Revenue, duly stamped, for the proper additional amount, and shall pay interest on the amount at 5 per cent.

The meaning to be attached to the words "the person acting in the administration of such estate and effects" was elaborately argued in the case of *The Attorney-General* v. *Smith* (1). There executors had certain pictures valued for the purpose of probate. They duly filed their affidavit, paying duty on the amount of the valuation, and distributed the estate according to their duty. It was afterwards discovered that the pictures were worth much more than the amount of the valuation, though the executors acted with perfect *bona fides;* and the Commissioners of Inland Revenue sought to compel them to bring in a further affidavit, and pay the additional duty. The Court, however, held that once the administration of the assets had been completed the executors were no longer "persons acting in the administration of the estate and effects," and if there was no person acting in the administration, the Inland Revenue could not be called upon to repay any sums they might might have received in excess, nor could they, if too little duty had been paid, recover the amount underpaid from the executors. The duty was, in such case, lost, and the Crown was without remedy.

If, therefore, Lorenzo Nunn administered the personal assets on which he paid duty in his lifetime, if he has since died, and there are no further assets to be administered, neither he nor his executors, if he had any, nor anyone else, can be held liable under the statute.

It is, however, as I have said, contended that these proceedings

(1) [1892] 2 Q. B. 289; [1893] 1 Q. B. 239.

Monroe, J. 1893. *In re* NUNN'S ESTATE.

for sale could not have been carried on without production of the probate, and that once this is shown to the Court all proceedings must be stayed until the affidavit for probate has been properly stamped. The proceedings here, however, are not proceedings by an executor. There is no question here now as to giving the probate in evidence; the suit is one by a chargeant on real estate for sale of the estate on which his charge is an incumbrance, and the claim has been long since proved without controversy. But again, it is said that whatever the remedy against an executor may be, the Court concerned in the administration of an estate will see that the revenue duties are paid. No doubt, if I were now engaged in the administration of the testator's personal estate, and it appeared that the stamp duty paid was deficient, I should have exercised the power and duty of seeing that all proper duties were paid. I should then be in the position of an executor administering the estate. But I am not concerned here with the administration of the testator's personal estate. These charges of £26,640 and £4300, so far as I am concerned, are non-existent, save in so far as they give priority to those who have mortgages or securities upon them, and the priority of these mortgages are already fixed by the schedule. I am selling these estates to pay incumbrances, and these duties are no incumbrances on the real estate. If I were to yield to this claim of the Commissioners of Inland Revenue, no person could safely deal with real estate without inquiring not merely as to the payment of succession duty, but also as to whether probate duty had been paid, and whether the valuation was such that no further duty could ever be required.

On this ground I must reject the claim of the Commissioners of Inland Revenue, even on the assumption that the charges were outstanding charges at the testator's death.

The second point, whether duty ever became assessable on these charges is, therefore, immaterial; but as the matter has been fully argued I think I ought to express the opinion I have formed. I assume that, in accordance with the views expressed by the Lord Chancellor, Lord Justice Barry, and Lord Justice Naish, in *Nunn's Estate* (1), there had been no merger prior to the making

(1) 23 L. R. Ir. 296.

of the will. How, then, was the merger, or what was equivalent to merger, effected? I take the view of the Court of Appeal to have been expressed tersely in a couple of sentences of Lord Justice Barry's judgment:—"At an early stage of the argument," he says, p. 304, "when the appeal was being very ably opened by Mr. Twigg, I suggested that the question was not one of merger or extinction of a charge, but what was the effect of the will? That was the conclusion I continued to adhere to, and which the Lord Chancellor and Lord Justice Fitz Gibbon have also adopted. It was not a question of intention; but what did this man, who was *dominus litis*, do by his will; and in my opinion no one could come to any other conclusion than that he intended to give the property clear of the charges, and that the residuary gift did not include them." Lord Justice Fitz Gibbon says:—"I wish we could get rid of the word 'merger.' This is not technically a question of 'merger,' but rather a question whether charges belonging to a freeholder pass with his real property under his will." Both the Lord Chancellor and Lord Justice Naish submitted the will to elaborate criticism, with the view of ascertaining whether, on the whole, the testator meant by its terms and general scope to extinguish the old charges altogether. I take it, therefore, that what determined the fate of the charges was the will, *qua* will, and the testamentary dispositions therein contained, and not any previous condition of the testator's mind at the time he made the will, as evidenced by the contents of the will itself. If this be so, and if I were now compelled to decide whether duty were ever assessable on the charges, I should hold, in accordance with the very able argument of Mr. Wall in opening the case, that it was.

The matter is succinctly put by Lord Justice Bowen in *The Attorney-General* v. *Hubbuck* (1). He was there dealing with a case of the real property of a partnership, used for partnership purposes. One partner, with the consent of the other, had made his will, seeking to reconvert into realty what in equity was personal estate. The Crown claimed duty on the ground, among others, that the right of assessment for probate duty accrued before the reconversion.

(1) 13 Q. B. Div. 275.

Monroe, J. 1893.

In re NUNN'S ESTATE.

The Crown succeeded, and Lord Justice Bowen in his judgment uses this illustration (p. 290):—"Take the case of a man who can by his election reimpose the character of realty upon land which, but for his election, would continue to be treated as personalty; he must make that election by some act not subsequent to his death; he cannot leave a will which, after he is dead, is to decide what is to be the nature of his property at the moment of his decease. . . . If a will, *which can only operate after the death of a man*, is too late to operate as an election on his part which will reimpress the character of realty upon that land which has been personalty until then, it seems to me that an agreement between two partners will not be effective unless it is not merely binding but is an agreement which becomes binding before the death, so as to take effect at the death." These observations, founded upon and governed by the decision of the House of Lords in the case of *The Attorney-General* v. *Brunning* (1), seems to me to carry the point in favour of the Commissioners of Inland Revenue. If the merger or extinguishment of the charges were not complete before the testator's death, the right to probate duty arose at once, and the change effected by will, speaking subsequently to the death, came too late to affect that right. It is not necessary for me to decide the point (I merely state my present view), since the first contention of the owners is, in my judgment, fatal to the present claim.

Disallow the claim of the Commissioners of Inland Revenue and grant the motion to set it aside, with costs.

Solicitor for the petitioner: *Ross Todd.*

Solicitor for the Commissioners: *The Solicitor for the Inland Revenue.*

W. G.

(1) 8 H. L. Cas. 243.

In the MATTER of the ESTATE of THOMAS WILLIAM KINAHAN and TERENCE GLANCY, Owners; Ex parte THE STANDARD LIFE ASSURANCE CO., Petitioners.

Monroe, J.
1893.
July 28, 31.

Appeal.
Oct. 27.

Practice—Sale—Purchaser—Grazing rents.

Where lands, which were sold on the 28th October, were subject to agistment contracts, terminating on the 1st November:—

Held, that the purchaser was not entitled to the half-year's grazing rents, payable on the expiration of the contracts.

Motion on behalf of John Flynn, the purchaser of the lands of Carrowntoosan and part of the lands of Timanagh, in the county of Roscommon, being lots 1 and 2 in the rental, for payment of the sums of £165 and £159 18*s.* 4*d.*, being the rents payable by Patrick C. Morris and James and Francis Glancy under lettings made the 11th March, 1892, and 19th February, 1892. The material parts of the rental and of these agreements will be found stated in the judgment of Mr. Justice Monroe.

C. A. O'Connor, for the purchaser:—

The Apportionment Act, 1870, does not apply to purchasers under the Court: *In re Keillor's Estate* (1). There it was sought to apply the Act to outgoings, but the principle is the same. It may be said that as these lettings were made by the Court the purchaser is not entitled to the rent. But that he is so was the point decided in *In re Dawson's Estate* (2). [Counsel argued on the construction of the agreements that they were lettings of the land and not mere agistment contracts.] Even if they were grazing lettings the purchaser is nevertheless entitled to the profits accruing due after the date of his purchase. An element, which it may be fairly assumed enhanced the purchase-money paid for these lots, was that these gales of rent would become payable in a few days.

(1) Ir. R. 6 Eq. 329. (2) 21 L. R. Ir. 441.

Monroe, J. 1893. *In re* KINAHAN'S ESTATE.

J. H. Shaw, for the petitioners having carriage :—

Under no circumstances can the claim for the whole year's rent be sustained. As to the second half-year's rent, due the 1st November, the conditions of sale as to lots 4, 8, and 10 were specially inserted, where there were tenancies under the Court, to exclude the principle of *In re Dawson's Estate* (1). Such a condition was unnecessary in these other cases. These were merely grazing contracts, and created no tenancies—they were mere licenses to use the grass on the premises. In *In re Dawson* (1), the tenancies were under Court leases which were set out in the conveyance to the purchaser. In *Walcott* v. *Condon* (2), Smith, M.R., says, at p. 433 :—"The principle of the Incumbered Estates Court appears to be, that as interest is charged on the purchase-money the payment is considered to have been made at the time from which interest is charged ; and it is no doubt reasonable that the purchaser should have the rents where he pays interest." He then puts the case exactly resembling the present :—"Suppose the purchase was made on the 22nd September, the interest would only be payable from the 6th October, and in such a case a question might arise as to whether the purchaser ought to have the rents which fell due on the 29th September." It was not necessary, there, for the Master of the Rolls to decide the point, but it is clear that the leaning of his opinion was that where the tenancy expires before interest on the purchase-money begins to run the purchaser is not entitled to the gale current at the time of the actual purchase.

O'Connor, in reply :—

The purchaser is deemed owner of the estate from the time of the sale, where, as in this case, the sale is in Dublin : Rule 32. The rights and liabilities are to be determined as if everything was done on that day—conveyance executed and receiver discharged. I admit that we can only claim the half-year's rent which had not accrued due at the time of sale.

(1) 21 L. R. Ir. 441. (2) 3 Ir. Ch. R. 431.

Monroe, J.
1893.
In re KINAHAN'S ESTATE.
July 31.

MONROE, J.: —

This is an application on behalf of Mr. John Flynn for an order that he may be declared entitled to two sums of £165 and £159 18*s.* 4*d.*, being the rents alleged to have become payable on the 1st November, 1892, out of two lots which he purchased in this Court on the previous 28th October. The circumstances under which the claim is made may be shortly stated thus:—Certain lands in the county of Roscommon were put up for sale in Dublin on the 28th October, 1892. The rental contained eleven lots, and Mr. Flynn became the purchaser of lots 1 and 2. In the conditions of sale it was stated that the purchaser of lots 4, 8, and 10 should not be entitled to receive any portion of the rent payable by Mr. James Glancy under his Court agreement, which would expire on the conveyance to the purchasers, subject, as stated in the rental, to the tenant's rights to emblements (if any). The descriptive particulars contained the following clauses:—"Lot 1. The lands of Carrowntoosan are at present held by a grazing tenant whose tenancy will expire on the 31st October next, after which date the purchaser will be entitled to immediate and clear possession of the lands, which are well known in the district as being of first-class quality, well watered, sheltered and fenced. Lot 2. This portion of the townland of Timanagh consists of really fine grazing parks, the grass of which has been let until the 31st October next, after which date the purchaser will be entitled to immediate possession." In the rental itself, giving the particulars of each lot for sale, lot 1 was described as being in possession of the owner, with the observation that the grazing thereof was held by Mr. Patrick Morris, and that the letting to him would not be interfered with until after the 31st October, 1892, when same would expire. The sum of £168 15*s.* 7*d.* mentioned in the rent column was stated to be the estimated letting value placed upon the land by Messrs. Brassington & Gale. The rental of lot 2 described the lands as being in the possession of the owner, with the exception of 3A. 2R. 36P., in possession of a tenant. There was no further reference to any grazing letting, but the rent of £159 18*s.* 4*d.* was stated to be the annual letting value of the portion in the owner's possession as estimated by Messrs. Brassington & Gale.

Monroe, J. 1893. *In re* KINAHAN'S ESTATE.

It now appears that part of lots 4, 8, and 10 had been let under Court agreements, pending the matter, the tenancies to terminate with the conveyance to a purchaser, and possession to be given save where the rights to emblements existed. It further appears that lot 1 had been comprised in an agreement made on the 11th March, 1892, between the Court and its Receiver, and one Patrick C. Morris, whereby, in consideration of the sum of £170, the Court did license and permit Patrick C. Morris to use all the grass on the lands for grazing purposes only, from the 4th November, 1891, to the 1st November, 1892. It was provided that the sum of £170 was to become payable by Morris, in two equal instalments on the 30th April and 30th October respectively, and that the agreement was to be deemed an agistment contract only, and not a letting or demise of land or anything in the nature thereof. There was a similar agreement, dated 19th February, 1892, between the Court and its Receiver of the one part, and James Glancy and Francis Glancy of the other. This agreement comprised all the portions of lot 2 in owner's possession and a considerable quantity of other lands. The sum to be paid in all was £400, payable in two equal instalments, on the 1st May and 1st November, and there were also some special provisions which do not affect the present controversy.

Mr. Flynn purchased on the 28th October, and obtained his conveyance on the 27th January following. He claimed by his notice to be entitled to what amounted to one year's letting value of the land prior to the date of his purchase, but Mr. O'Connor, at the hearing of the motion, narrowed the demand, and sought to be declared entitled to the instalment payable by Patrick C. Morris, on the 1st November, 1892, in respect of lot 1, and to so much of the instalment payable on the same day by James and Francis Glancy as would represent the value of the portion of lot 2 stated to be in owner's possession.

The clear law and practice of this Court undoubtedly is that, if property in the hands of tenants be sold, the purchaser is entitled to the rents from the gale-day prior to the sale, and if the lands be subject to head-rents, the purchaser is bound to pay the head-rent from the gale-day prior to the sale. The purchaser is the owner of the lands from the date of his purchase, and, where the

tenancy continues, is the only person to recover the amount of the current gale. The land is sold to him subject to particular tenancies, and he is entitled to recover and to retain the amount of the gale of rent which does not accrue due till after the sale has taken place. In *Dawson's Estate* (1) I held that the purchaser was entitled to the current gale of rent, where in the rental the tenants were described as holding under a tenancy which would be determined by the execution of the purchaser's conveyance. The tenancy was not put an end to by the sale. It continued at all events to the date of the conveyance. But does the rule extend to the case of an agistment contract? It is not, and could hardly be, contended that the purchaser in this case bought on the faith that he would be entitled to the instalments for grazing, which, as a matter of fact, became payable two days after the sale. The rental gives no information as to who had the contract for grazing lot 2. No information was given as to the amounts payable in respect of either of the lots, or as to when they became payable. The lands were described as in owner's possession, but it was stated in the descriptive particulars that, owing to certain arrangements which had been made, possession could not be given to the purchaser until after the 31st October. This was all. I am satisfied the purchaser never dreamt of being entitled to any money payable under the grazing contracts, and that the claim was stated for him after his contract had been completed. Yet if the law gives him these instalments he is entitled to an order for payment, whether or not he bought on the faith of getting them. I am satisfied, however, that it does not. There is no letting or demise of the land. There is merely a license or permission to use all the grass on the land. No tenancy has been created. There is merely an agistment contract, which amounts to a sale of the eatage of the land—no more: *Mulligan* v. *Adams* (2). A purchaser of the land is not entitled to be paid any portion of the money which the vendor may be entitled to receive under such a contract, although the time for payment may not have arrived before the sale of the lands has been completed.

This motion must therefore be refused with costs.

W. G.

(1) 21 L. R. Ir. 441. (2) 8 Ir. L. R. 132.

Appeal. 1893.

In re Kinahan's Estate.

Oct. 27.

The purchaser (Flynn) appealed.

O'Connor, for the appellant.

Kenny, Q.C., and *J. H. Shaw*, for the respondent.

The Court of Appeal (Walker, C., and FitzGibbon and and Barry, L. JJ.) affirmed the decision of Monroe, J., and dismissed the appeal, with costs.

Solicitor for the purchaser: *Farrell M'Donnell.*

Solicitors for the petitioners having carriage of the sale: *Whitney & Moore.*

G. Y. D.

CHAMIER *v.* TYRELL.

(In re GEORGE GERALD TYRELL, Deceased.)

(1894. No. 109.)

V.-C. 1894. Feb. 12, 27.

Husband and wife—Marriage settlement—Interest by entireties—Will—Construction—Ademption.

By marriage settlement, made in 1868, mortgages were assigned to the trustees, upon trust to pay, during the joint lives of the husband and wife, the interest, dividends, and annual produce of the trust funds, upon the joint order or receipt of husband and wife, and after the death of either, to pay the same to the survivor for life. The settlement contained a covenant by the husband that the money due on the mortgages was well secured, and that he would make good any deficiency:—

Held, that, as between husband and wife, this trust created an interest by entireties, and that they were entitled to an interest *per tout* only; and that arrears of interest accrued in the life of the husband belonged to his estate, and could not be considered as choses in action of the wife not reduced into possession by the husband.

A testator, by a codicil to his will, directed certain moneys to be brought into hotchpot with portions bequeathed by his will to younger children:—

Held, that there was no ademption of any part of the portions by reason of this direction.

Originating Summons, under Order LV., R. 4, Rules 1891, to determine, without administration of the estate of the deceased, whether the executors of George Gerald Tyrell, deceased, were liable under a covenant entered into by him with the trustees of his marriage settlement, dated 10th August, 1868, and if so, from what funds, to pay to Henrietta Tyrell, widow of the deceased, the arrears of interest on £4200, and £1800, mortgage debts assigned to the trustees, which accrued due in the lifetime of George Gerald Tyrell, and which remained unpaid at the time of his death.

V.-C. 1894.

CHAMIER v. TYRELL.

The executor also asked the opinion of the Court upon the question whether a legacy of £10,000, bequeathed by the will of the deceased had been adeemed to the extent of £1500, being the sum paid by the deceased to the trustees of the settlement, executed on the marriage of his daughter, Elizabeth Chamier, otherwise Tyrell, by reason of a direction, contained in a codicil to his will, that the sum of £1500 should be brought into hotchpot.

An affidavit of Henrietta Tyrell, widow of the deceased, stated that by settlement, dated 10th August, 1868, which was executed on her marriage with the deceased, two several mortgage debts of £4200 and £1800, secured by indentures of 1862, and 1864, respectively, were assigned to Richard James Tyrell, and Philip Edward Poppe, upon trust, after the solemnization of the marriage, during the joint lives of her husband and herself, to pay the income thereof upon their joint order and receipt, and after the death of either to pay the income to the survivor for life, and after the death of the survivor, as to the trust premises, in trust for the children or issue of the marriage as therein. In the said settlement the deceased covenanted with the trustees (among other things), that the lands and premises comprised in the mortgages were a full and sufficient security for the payment of the principal and interest, and that, in the event of any deficiency, he would make it good. Interest was from time to time paid on foot of the mortgages to the deceased, but at the date of his death over £650 was owing for arrears of interest, and all the said arrears, except £128 12*s.* 6*d.*, remained unpaid at the date of the summons.

There was issue of the said marriage four daughters and one son. Elizabeth, the eldest daughter, married Captain Chamier, and on her marriage the deceased paid to the trustees of her marriage settlement £1500 upon the trusts thereof.

The said George Gerald Tyrell, by his will, dated the 1st August, 1884, directed his executors to pay his widow £500 for her life for the use of herself and her children, and directed his executors to raise out of his personal estate £10,000, and to hold the same for his four daughters upon the same trusts as were thereby declared in respect of money thereby appointed under his marriage settlement to his daughters.

By a codicil to his said will, dated 19th March, 1891, the testator directed that the sum of £1500 paid to the trustees of Mrs. Chamier's settlement should be brought into hotchpot.

The testator died on the 3rd September, 1893, and probate of his said will and codicil was granted to his widow and Edwin Francis Chamier, the executrix and one of the executors therein named.

John Stanley, Q.C., for the plaintiff:—

The questions are whether Mrs. Tyrell is entitled to be paid arrears of interest on the mortgages which accrued in her husband's lifetime, and whether the legacy of £10,000 bequeathed by George Gerald Tyrell's will has been adeemed to the extent of £1500, the amount paid by him to the trustees of his daughter's marriage settlement, by reason of the direction contained in the codicil to his will that the £1500 should be brought into hotchpot.

The executor also asks the direction of the Court as to whether he should continue to pay the premiums on policies effected by the testator on the life of Mr. J. Temple Reilly, who is now eighty-two years of age. The sums insured amount to £2100, and about £300 bonuses. The premiums are £288 per annum, and the present surrender value is about £800.

Shekleton, Q.C., for the defendants Flora Tyrell and David Haughton:—

The husband and wife took by entireties. [Counsel referred to and commented on *Pollok* v. *Kelly* (1), *Ward* v. *Ward* (2), *Godfrey* v. *Bryan* (3).] But the wife is entitled to arrears of rent accrued in the lifetime of her husband in preference to her husband's executors, because such arrears were choses in action, though they were due in respect of the joint interest of the husband and wife: Williams on Executors, 9th ed., p. 741. These arrears are in the same position as rents of the wife's lands not received by the husband.

(1) 6 Ir. C. L. R. 367. (2) 14 Ch. Div. 506. (3) *Ibid.* 516.

V.-C. 1894. CHAMIER v. TYRELL.

Law, Q.C., for the defendants Henrietta Tyrell and Philip Edward Poppe :—

The estate which the husband and wife had under the settlement was an estate *per mie* and *per tout* in the settled property, and the husband not having reduced these arrears of interest into possession in his lifetime, they now belong to the wife by survivorship : Lush on Husband and Wife, page 47 ; Roper on Husband and Wife, page 25.

Matheson, Q.C., for George G. M. Tyrell, the residuary legatee :—

The arrears belong to the husband's estate, and not to the wife : Williams on Executors, 9th ed., p. 611. It is admitted that under the settlement of the 10th August, 1868, George Gerald Tyrell and his wife took the income of the trust funds during their joint lives by entireties : *Ward* v. *Ward* (1) ; *Godfrey* v. *Bryan* (2) ; *Atcheson* v. *Atcheson* (3). The result was that the income during the joint lives was the property of the husband. The interests taken were not *per mie* and *per tout*. It was an interest *per tout*. There is no analogy to the instances referred to in the passages cited from the text-books, as to the wife's right by survivorship to arrears of rent accruing due out of her own real or leasehold estate, and remaining unpaid at her husband's death.

In the present case the interest had actually accrued due, and it is a mere accident that it was not paid in the deceased's lifetime. On the death of either husband or wife the survivor takes the whole, not by survivorship but under the original limitation, and in the case of personalty the wife has no equity to a settlement out of it : Crawley on Husband and Wife, p. 27.

The legacy of £10,000 to the testator's daughters has been adeemed by the direction in the codicil that the £1500 settled on Mrs. Chamier should be brought into hotchpot, and the fact that this direction was contained in a codicil does not take it out of the general rule : *Powys* v. *Mansfield* (4) ; Theobald on Wills, 2nd Ed., p. 597.

(1) 14 Ch. Div. 506.
(2) *Ibid.* 516.
(3) 11 Beav. 485.
(4) 3 My. & Cr. 359.

THE VICE-CHANCELLOR:—

V.-C. 1894. CHAMIER v. TYRELL.

[Having dealt with questions raised by the summons, which involved no point of law, and which are not material to this report, proceeded:—]

Feb. 27.

The question intended to be asked in No. 4 is whether the testator's widow is entitled to the arrears of interest on the funds in the settlement of 1868, due at the death of the testator, or whether they form part of the personal estate of the testator? This depends on the effect of the trust to pay during the joint lives of the husband and wife the interest, dividends, and annual produce of the trust funds, upon the joint order or receipt of both, and after the death of either of them to pay the same to the survivor for life. This would have created a joint tenancy between persons not in the relation of husband and wife, but it created, as between them, an interest by entireties. They were not entitled, as in joint tenancy, to interests *per mie* and *per tout*, but to an interest *per tout* only, arising from the legal principle since abolished, that husband and wife were only one person in the law. The husband was entitled, during his life, to sue for and recover the income of the trust funds in his own name, and to receive and apply it for his own benefit. The income did not arise from any property of the wife, nor had she any right to interfere with the payment of it to her husband. The wife was not entitled to an equity to a settlement out of it, as decided by Lord Langdale, in *Atcheson* v. *Atcheson* (1), and by Sir R. Malins in *Godfrey* v. *Bryan* (2), and it was liable to be attached during the coverture for the debts of the husband, as held by Sir George Jessel, in *Ward* v. *Ward* (3). These cases go upon the ground that, during the joint lives, the income is not in any sense the property of the wife, and that the husband takes the whole income. The arrears that accrued in the life of the husband cannot, therefore, in my opinion, be considered as choses in action of the wife, not reduced into possession by the husband, and therefore surviving to her. For the widow it was contended that the arrears are in a similar position to the rents of the wife's

(1) 11 Beav. 485. (2) 14 Ch. Div. 516. (3) *Ibid.* 506.

V.-C. 1894. CHAMIER v. TYRELL.

lands, any arrears of which accrued in the husband's life she would be entitled, as no doubt she would, to sue for and recover in her own name. But in the cases where a wife surviving was held so entitled the estate in the lands survived to the wife, and the rents due were held to survive with it as accessories following the principal. Nothing in the nature of a principal subject was here secured to the wife which could in like manner carry the income to the wife surviving. The question is one of some doubt and difficulty; but I am of opinion that in this case the widow is not entitled to the arrears of interest which accrued due in her husband's life.

There is another matter which has not been raised in argument, which seems to me to prevent Mrs. Tyrell from claiming these arrears. They are considered by all the parties interested to be irrecoverable out of the mortgaged lands, and it is not contended that Mr. Tyrell, or the trustees during his life, could have obtained payment of them, the lands being subject to heavy prior charges and the rental having been largely reduced. The real object of the contention of Mrs. Tyrell appears to be to claim, under the covenant of Mr. Tyrell in the settlement, that the money due on these mortgages is well secured on the lands and that the lands are a full and sufficient security for the same, and that Mr. Tyrell would make good any deficiency and pay same to the trustees of the settlement. If, therefore, Mrs. Tyrell were to maintain her claim to be entitled to the arrears of interest she would be in a position to require the trustees of the settlement to claim to have them paid out of the assets of her husband, and to hand them over to her. This appears to me to be inequitable, because Mr. Tyrell, who could not have got payment of the arrears of interest, and who was thus debarred from getting them in from the mortgaged lands, would be held liable to his wife for money which, if it were possible for him to get in, and he had got in, would, beyond doubt, have been his own. If these arrears were now paid out of the assets by virtue of the covenant, I think his executors would be, in equity, bound to apply them as if paid as they accrued, which would lead to the absurdity of getting them in from the assets to pay

them back to the assets. If the trustees had required Mr. Tyrell, as each half year fell due, to make good the deficiency under his covenant, surely he would have been entitled to say to them that they could not sue him for not paying himself.

I accordingly hold that the fourth question must be answered in the negative.

The last question is as to the partial ademption of the legacy of £10,000 left to the testator's four daughters in equal shares. Mrs. Chamier, one of them, on the occasion of her marriage, which was subsequent to the will, got a portion of £1500 from the testator. This, without more, would of course have been an ademption *pro tanto* of her share of the £10,000, and the balance (£8500) only would be payable out of the assets, £500 of it going to Mrs. Chamier. But the testator made a codicil to his will after the marriage, in which he recites the payment of the £1500, and directs that the said sum should "be brought into hotchpot." The question on this is whether Mrs. Chamier's £1500 is to be added to the £10,000 legacy, and the £11,500 divided by four, and giving Mrs. Chamier £1375 out of the £10,000, and each of the other daughters £2875, or whether Mrs. Chamier is only to have £500 out of the £1000, and each of her sisters £2000. The primary meaning of bringing a portion into hotchpot is to throw it into the common fund, to be divided so as to equalize all the children's portions, thus adding to the fund on which the shares are to be calculated the amount of the prior advancement. If the testator merely intended ademption he need not have said anything, for the law, which he may be supposed beyond the ordinary presumption applicable to everyone to have been acquainted with, would have effected the ademption. It would seem to be his intention to do by these words something different from what would otherwise have taken place. If he desired to refer merely to ademption he would probably have said that he revoked the gift of her share of the £10,000 and left her £500 in lieu thereof. In ordinary cases of hotchpot or advancement under the statute the amount previously given to the children advanced is added to the sum divisible, and the total divided into equal shares. Here the £10,000 is the sum left by the will to be

V.-C. 1894. CHAMIER v. TYRELL.

divided. I feel bound to give effect to the words used by him and to hold that the full £10,000 is still payable in the way I have mentioned.

Solicitor for the plaintiff: *E. D. Atkinson.*

Solicitors for the defendants Henrietta Tyrrell and Philip Edward Poppe: *William Fry & Son.*

T. H. M.

M. R. 1892.

Nov. 19, 23, 24, 25.

Appeal. 1894.

Feb. 28. March 1, 2.

M'DONNELL *v.* ALCORN.

(1883. No. 4693.)

Estoppel—Res judicata—*Judgment* in rem—*Judgment* inter partes—*Decree in administration suit—Collateral issue—Decree as to legitimacy—Proof of title.*

P. was entitled, under the will of his mother M. S., to an annuity, devised by her to him his heirs and assigns for ever, and charged on certain real estate, of which (with other property) she was owner in fee. He lived and cohabited with M. from the commencement of the year 1818 till his death in 1823, and there were three children of such intercourse, of whom the eldest was T., born in 1819, and the youngest E., born in 1822. He died intestate as regards his real estate. Prior to 1836 a suit was instituted in the Equity Exchequer for the general administration of the real and personal estate of M. S. T. filed a charge in the administration suit, claiming the annuity as the lawful son and heir-at-law of P. D., the owner of the lands charged with the annuity as tenant in tail, disputed the claim and filed his answer by way of discharge. T.'s right to the annuity turned on the fact of a marriage alleged to have been celebrated between his parents P. and M. in 1818. The Remembrancer of the Court made a report, finding that T. was the lawful son and heir-at-law of P., and as such entitled to the annuity charged on the lands. Exceptions to this finding were taken by D., and an issue was directed to be tried as to whether T. was the lawful son and heir-at-law of P. or not. T. was plaintiff in the issue and D. the defendant. The jury disagreed, and the matter came again before the Equity Exchequer, and, by decree, dated 2nd May, 1840, the Court set aside the exceptions, on the ground that the owner of the lands charged could not, in any view, be entitled to the annuity, and con-

firmed the report of the Remembrancer "without prejudice to any original proceeding by any person who may conceive himself entitled to the said annuity for recovery thereof."

Pursuant to the decree, the lands charged with the annuity were sold (subject to the annuity), and were conveyed to L. in 1845. In 1878 the lands were sold, subject to the annuity, in the Land Judges' Court, and conveyed by Landed Estates Court conveyance, dated 1879, to G. After the decree of 1840 T. remained in enjoyment of the annuity till his death in 1880. He died intestate and unmarried, and having survived his brother (the second child of P. and M.), who left no issue. Administration of the estate and effects of T. was granted to E., who died in 1887. G. assigned the lands charged with the annuity, and conveyed to him by the Landed Estates Court conveyance, to the defendant, who was in possession and receipt of the rents and profits under such assignment. The executors of E. claimed payment of the arrears of the annuity charged on the lands by the will of M. S., and a declaration that the annuity and the arrears thereof were well charged:—

Held, that the defendant, as owner of the lands charged with the annuity, was not estopped from denying that E. was the legitimate daughter of P., and was entitled to demand proof of her claim by heirship.

Held, also, that the decree of the Equity Exchequer in 1840 in the administration suit, on the question of the legitimacy of T., was not an adjudication in the nature of a judgment *in rem*.

A judgment *in rem* is a judgment by a Court having special jurisdiction over the subject-matter.

Trial of Action.

Previous to her death, which occurred in 1803, Mary Skerritt (senior), widow, was seised in fee-simple of an undivided moiety of the lands of Balrobuck, and other lands situate in the barony of Clare and county of Galway. By her will, dated the 16th September, 1803, she gave and devised unto her second son Peter Skerritt, from and immediately after the decease of Margaret Deane, and to his heirs and assigns for ever, one annuity, yearly rent or sum, of £40 of the then currency of Ireland, charged and chargeable upon her said undivided moiety of and in the lands aforesaid, payable half-yearly; and subject thereto she gave and devised her said undivided moiety to trustees, upon the trusts and for the purposes in the will mentioned. After the death of his mother, the testatrix, (Margaret Deane having also died) Peter Skerritt entered into enjoyment of the annuity or rentcharge under the provisions of the will. The lands were partitioned and

M. R. 1892. M'DONNELL *v.* ALCORN.

conveyed in severalty in 1819, the lands of Balrobuck being conveyed to the uses by the said will declared concerning the undivided moiety. Peter Skerritt died on the 9th March, 1823. After his death a testamentary suit was instituted in the Court of Prerogative in Ireland, in which Mary Skerritt, otherwise Lydon, alleging herself to be his widow, propounded, as his last will and testament, a document dated the 1st March, 1823. In the same suit John Deane Skerritt, a brother of the deceased, propounded as his last will a document dated the 17th October, 1821, by which the said John Deane Skerritt was appointed executor, and he impeached the validity of the will of the 1st March, 1823. The will of 1821 was in the handwriting of Peter Skerritt himself, and by it he left a legacy to each of his two natural children, and £10 a-year to the mother of these children during her life, provided that his executors were satisfied as to her conduct. At the time of the execution of this document Peter Skerritt had two children living by Mary Skerritt or Lydon. At the date of the will of 1823 there were three children living, and by it he left property to her as his wife, and made provision for his three children. In the litigation in the Prerogative Court, Mary Skerritt or Lydon proved that a marriage was celebrated between her and Peter Skerritt in 1823, and the will of that year was declared established, but as it was not attested, as was then by law required for devising real estate, there was an intestacy as regards such estate. The three children had all been born before the marriage of 1823, of whom Thomas was the eldest, having been born in 1819. Eleanor, the youngest, was born in 1822. Prior to 1836 a suit was instituted at the equity side of the Court of Exchequer in Ireland for the general administration of the real and personal estate of Mary Skerritt senior, and in the proceedings in that suit the title of Thomas Skerritt to the annuity or yearly rentcharge of £40 was called in question by Dominick Deane Skerritt, who was then the owner of the lands charged with the said annuity as tenant in tail thereof, and it was alleged that Thomas Skerritt was not the heir-at-law of Peter Skerritt. By a report of the Remembrancer, made in pursuance of a decree in the cause, it was found that Thomas Skeritt was the heir-at-law of Peter Skerritt, and that he was as such entitled, on the death of

his father, to the annuity of £40, and that there was due to the executrix of Peter Skerritt for arrears of the annuity to the gale-day preceding the death of Peter Skerritt the sum of £332, and the sum of £609 due to Thomas Skerritt for arrears to the 21st May, 1839. Exceptions were taken to the report, and by an order of the Court, dated the 7th February, 1840, an issue was directed to be tried in Galway as to whether Thomas Skerritt was the lawful son and heir-at-law of Peter Skerritt. The issue, in which Thomas Skerritt was plaintiff and Dominick Deane Skerritt, by his committee and next friend (he having become lunatic), was defendant, was tried as directed, it being alleged on behalf of the plaintiff that a marriage had been duly celebrated between his father and mother in April, 1818. The jury disagreed, and the matter came again before the Equity Exchequer.

By a final decree in the cause, dated the 2nd May, 1840, it was ordered that so much of the said order of the 7th February, 1840, as directed an issue to try whether the said Thomas Skerritt was the lawful son and heir-at-law of Peter Skerritt should be discharged, on the ground that the defendant Dominick Deane Skerritt, who took the exceptions to the report of the Remembrancer, could not, in any view of the matter, be entitled to the annuity devised to Peter Skerritt, and it was ordered that the exceptions should be set aside, without prejudice to any original proceeding by any person who might conceive himself entitled to the said annuity, for recovery thereof, and that the report should stand confirmed. In pursuance of the decree, the lands of Balrobuck were sold, and, by indenture dated in 1845, were conveyed to Mr. Mark Lynch, subject to the annuity of £40. No steps were taken by anyone after the decree of 1840 to impugn the legitimacy of Thomas Skerritt, and he received the annuity during the remainder of his life. He died intestate and unmarried on the 12th August, 1880. As regards the second son of Peter Skerritt and Mary Lydon, or Skerritt, it was stated in an affidavit filed on behalf of the plaintiffs that he left this country in 1852 for the United States, and died there shortly after his arrival, leaving a wife but no issue surviving him. Eleanor, the youngest child of Peter Skerritt, married the plaintiff Patrick M'Donnell. On the 1st December, 1880, letters of administration to the estate of Thomas Skerritt were granted to Eleanor

M. R. 1892. M'DONNELL v. ALCORN.

M'Donnell. She died on the 12th February, 1884, and probate of her will was granted to the plaintiffs, as executors thereof.

In 1878 the lands of Balrobuck were sold by the Land Judges of the Chancery Division, subject to the payment of the annuity of £40, and were, by indenture of the 28th February, 1879, conveyed to Mr. J. Gunning, subject to the said annuity. The defendant was in possession of the rents and profits of the lands of Balrobuck, as assignee of Mr. Gunning.

The plaintiffs claimed an account of what was due to them, as executors of Eleanor M'Donnell, for arrears of the annuity of £40, late Irish currency, devised by the will of Mary Skerritt, and that the said annuity and the arrears thereof might be declared well charged on the lands of Balrobuck. In their statement of claim they submitted that, as between Eleanor M'Donnell and the defendant, the right of the said Eleanor M'Donnell to the annuity was ascertained and determined by the decree of the 2nd May, 1840, and that the defendant should not be admitted against the said decree to say that Thomas Skerritt was not the lawful son and heir-at-law of Peter Skerritt.

In his statement of defence the defendant submitted that the decree of the 2nd May, 1840, did not in any way ascertain or determine the right of Eleanor M'Donnell to the annuity, and that the decree did not conclude or estop him from disputing the legitimacy of Thomas Skerritt.

The evidence which was given by affidavit at the trial of the action is sufficiently referred to in the judgment of the Master of the Rolls.

Serjeant Dodd and *Matheson, Q.C.* (with them *Eustace Johnston*), for the plaintiffs :—

The right of Eleanor M'Donnell to the annuity charged on the lands of Balrobuck was ascertained by the decree of 1840. There is the same issue here as was decided by the Equity Exchequer in that year. No matter what way the issue was raised the thing to consider is whether the same question has been decided. Where a verdict is found on any fact or title distinctly put in issue, such verdict is an estoppel between the same parties or their privies : *Outram* v. *Morewood* (1). The decree of 2nd May, 1840, binds the

(1) 3 East, 345.

defendant as a person in privity with the parties in that suit. The issue knit in those proceedings was whether Thomas was the heir-at-law of Peter, and that turned on the question whether there was a valid marriage in 1818; and that was material to be decided in the suit. The defendant is the representative of Dominick Deane Skerritt, and being the assignee of the land charged with the annuity, is in privity with the person who had it in 1840. The decision is conclusive in this suit: *Barrs* v. *Jackson* (1); *Blakemore* v. *Glamorganshire Canal Company* (2). The lands were sold under the decree which declared Thomas the heir-at-law; and a Landed Estates Court conveyance creates the highest class of privity: *Tottenham's Estate* (3). The conveyance of 1879 itself recognizes a privity of estate, and at the date of the conveyance Thomas had acquired a title by the Statute of Limitations.

In *Alison's Case* (4) it was held that the judgment of a Court is not only conclusive with reference to the actual matter decided, but that it is also conclusive with reference to the grounds of the decision, provided that the actual grounds can be ascertained from the judgment itself. (See judgment of Mellish, L.J., at page 25.) Here the ground on which the legitimacy of Thomas was decided was the fact of the marriage in 1818, and that involves the legitimacy of the younger children. The fact of the marriage at that date is concluded by the decree: *Priestman* v. *Thomas* (5); *Duchess of Kingston's Case* (6).

This decision in 1840 was a judgment as to *status*, and is therefore a judgment *in rem*, and binding on all the world: *Niboyet* v. *Niboyet* (7). At page 12, Brett, L.J., says:—"A judgment or decree determining what is the *status* of an individual is a judgment or decree *in rem*. It is, therefore, if binding at all, not only a binding judgment as between the parties to the suit, but is to be recognized as binding in all suits and by all parties."

Even supposing there is no estoppel or no judgment *in rem*, we submit on the evidence that the plaintiffs have established the fact of the marriage of 1818, and that they are entitled to succeed.

(1) 1 Ph. 582.
(2) 2 C. M. & R. 133.
(3) Ir. R. 3 Eq. 528.
(4) L. R. 9 Ch. App. 24.
(5) 9 P. D. 70.
(6) Smith's Leading Cases (8th ed.), vol. ii., pp. 784, 803.
(7) 4 P. D. 1.

M. R. 1892. M'DONNELL v. ALCORN.

Serjeant Campion, Q.C., *William Kenny, Q.C.*, and *F. Fleming*, for the defendant :—

We are entitled to put the plaintiffs on proof of the title of Eleanor M'Donnell to this annuity, and they have failed to prove their case. They rest *simpliciter* on the proceedings in the Equity Exchequer which culminated in the decree of 1840. But that suit was not a suit as to the legitimacy of any one; it was an ordinary general administration suit. All that the decree declares is that Thomas Skerritt is entitled to the annuity, "without prejudice to any original proceeding by any person who may conceive himself entitled to said annuity for recovery of arrears thereof." The suit was not constituted for the purpose of determining the right to the annuity, and the matter only arose incidentally, and consequently there is no estoppel, and the decree is not conclusive *in rem : Concha* v. *Concha* (1) The cases on the point cited by the other side deal with suits for the ascertainment of the rights of particular persons to a particular thing; here the right to the annuity was a purely collateral matter.

As far as the evidence of pedigree in this case is concerned there is not a line of legal evidence put forward. The plaintiffs are bound to prove the descent from Peter Skerritt according to the ordinary rules, whereas they have not attempted *dehors* the decree of 1840 to prove what was necessary, and the action must be dismissed. There is no statement on the face of the conveyance of 1845 that Thomas was entitled to the annuity.

Even if it were held that there was any estoppel in the case it could not bind Gunning, who was the assignee under a Landed Estates Court conveyance, and could not be effected through privity of title by equities affecting the former owners which are not mentioned in the conveyance: *Tottenham's Estate* (2).

The decree of 1840 is not a judgment *in rem*. It is not the judgment of a Court having exclusive jurisdiction over the special subject-matter.

The documentary and other evidence, and all the probabilities of the case, conclusively show that there never was any marriage

(1) 11 App. Cas. 541. (2) Ir. R. 3 Eq. 528.

solemnized between Peter Skerritt and Mary Lydon previous to the ceremony of 1823.

[Counsel also cited *The Queen* v. *Hutchings* (1).]

Eustace Johnston, in reply :—

The question before the Equity Exchequer was, whether Thomas was the legitimate son of Peter Skerritt; and the fact of the marriage of 1818 was the necessary ground on which to arrive at a conclusion in favour of the claim. It was not a collateral matter but a material and necessary thing to be decided. The fact was distinctly put in issue, and the doctrine of *Outram* v. *Morewood* (2), and the other cases cited, applies. *Concha* v. *Concha* (3) does not apply, because there the finding as to the domicil was not necessary to the decree.

The decree of 1840 is conclusive as to the legitimacy of Eleanor M'Donnell: *The Queen* v. *The Inhabitants of Hartington* (4); *The Queen* v. *The Inhabitants of Wye* (5).

The proof of descent is sufficient. The decree of 1840 established the legitimacy of Thomas and the fact of the marriage of 1818; and there is no question that the parties to the marriage continued to live as husband and wife, and that Eleanor M'Donnell was born in 1822 as issue of that union.

Even if there is no estoppel or no final adjudication the evidence establishes the fact of the marriage of 1818; and the presumption of the Court is in favour of legitimacy. It is a very strong circumstance that notwithstanding the proviso in the decree no subsequent steps were taken by any one to impugn the decision as to the legitimacy of Thomas Skerritt. The second ceremony of marriage in 1823 is explained by the fact that the first one in 1818 was not performed by a parish priest but by a friar.

THE MASTER OF THE ROLLS :— Nov. 25.

This is a very curious and in some aspects an interesting case, and in pronouncing the opinion I have arrived at, I wish first to

(1) 6 Q. B. Div. 300.
(2) 3 East, 345.
(3) 11 App. Cas. 541.
(4) 4 E. & B. 780.
(5) 7 A. & E. 761.

M. R 1892.

M'DONNELL v. ALCORN.

say, that I entertain no sympathy whatsoever with the position of Mr. Alcorn, who represents Mr. Gunning, who bought the estate in the Landed Estates Court, expressly charged with the annuity in question, and to whom it was assigned by deed dated 28th February, 1879. Therefore, if there be anyone at all entitled to receive the annuity, Mr. Alcorn, as the representative of the estate of Gunning, will be bound to pay it, and it makes no difference to him one way or the other whether he is to pay it to the present applicant, or to some one else, provided he obtains a valid discharge. Therefore, I think his position is one into which no element of sympathy enters. The questions, however, which I have to decide are, first, whether Mr. Alcorn is in a position to require proof of title on the part of the person who now claims the annuity; and, secondly, if he is, whether title has been shown by the claimants or not.

The case turns mainly on the consideration of events which occurred between 1818 and 1823. That is now a long time ago, and the matter has also been the subject of judicial investigation, to some extent in 1823 and 1824, and afterwards more definitely in 1839 and 1840; and the decision at which I have to arrive must necessarily involve to some extent the consideration of both of these proceedings, long since past, and under which Thomas Skerritt, who has been so often referred to in the case, and who was born in 1819, was undoubtedly in the possession and enjoyment of the annuity until his death. It is the transactions which have occurred since his death that have directly raised the questions now before me.

It appears that Mary Skerritt, who was a member of a family of some position in the county of Galway, was the mother of several sons; and by her will, after reciting that she was seised in fee-simple of an undivided moiety of certain lands, she devised an annuity of £40, late Irish currency, in the following terms:— "I give and devise unto my second son, Peter Skerritt of Lodge in the county of Galway, immediately after the decease of Margaret Deane, otherwise Kirwan, and to his heirs and assigns for ever, one annuity yearly rent or sum of £40 . . . to be paid and payable out of and charged and chargeable upon my said undivided moiety of and in the lands of Balrobuck." The person

to whom a prior life estate was given died in the lifetime of the testatrix, and so Peter Skerritt from the decease of his mother was in the enjoyment of the annuity, up to the time of his own death, which took place in 1823—although apparently it was irregularly paid.

Till his marriage with Mary Lydon, which, at one time or another, undoubtedly took place, Peter Skerritt was an unmarried man. He was a retired army lieutenant on half pay, and lived in or near the town of Galway. He there met a woman, called Mary Lydon, in or about 1818, and they lived together under such circumstances that there were three children born as the offspring of the union, whether it was legalized or not. The eldest of these children, I am quite satisfied on the evidence before me, was Thomas Skerritt, to whom I have referred, and who was born, as I have said, in 1819. In the spring of 1823, Peter Skerritt and Mary Lydon having since 1818 cohabited in different places in the town of Galway, Peter Skerritt was in bad health, and he died on the 9th of March, having previously made his will, dated the 1st March; but that will and a previous one made in 1821, which was in evidence before me, were not executed so as to pass real estate. The second will, however, was admitted to probate, but not till after the litigation in 1823 and 1824, at which last date probate was granted, and it must of course be treated as being a final testamentary disposition revoking the document of 1821.

Now, in the will of 1821, three years after his intercourse with this woman had commenced, he does not make any mention of her as his wife, nor of any of the children by name, nor does he dispose of such property as he had to dispose of in the way that would be expected, if he were dealing with his wife and lawful children. That is in itself a very curious fact, if it be the case that he was married to her all the time. He is shown to have treated the woman with affection and respect, according to the evidence of herself and her witnesses, whether she was his wife or not. It would of itself be a remarkable thing that a man living on affectionate terms with his wife should not refer to her as such in his will nor to his children by name; but it is more suggestive still, when we find that he leaves a legacy to each

M. R. 1892.

M'DONNELL v. ALCORN.

of his two *natural* children, and to the mother of those children, the provision for her being the sum of £10 a-year during her life, provided that his executors were satisfied as to her conduct.

That will of 1821 was all in the testator's own handwriting, and is the first piece of documentary evidence in the case. The will of 1823, which was made eight days before his death, does mention Mary Skerritt, as his wife, and does deal with his property in a way which would be expected from a man married, and being on terms of confidence with his wife. He leaves property to her and makes provisions for his three children. There were then three children, but there is no doubt that the woman and the two children to whom he refers in the will of 1821, are the same woman and two of the same children whom he describes in the will of two years later as his wife and lawful children. Anyone having only these two circumstances to go upon would say at once that the man must have been married in the meantime, that is between the dates of the two wills. Now there is another fact proved beyond question. In February, 1823, before the execution of the will of that year, and a very short time before his death, he was regularly, legally, and canonically married to this woman by the priest of the parish where he resided, the woman being married by the name of Lydon. That is not all; because soon after his death a dispute arose as to the will of 1823, and it became the subject of litigation in the Prerogative Court, where the question of the *status* of his wife arose in such a way that she found herself bound to go into the matter and show that she was the wife of Peter Skerritt. There were circumstances of suspicion as regards that alleged last will, such as its not being discovered for several weeks after the death of the testator, when it was stated to have been found in a drawer in the very small house in which they lived, the inference suggested being that it was concocted after his death. A question of undue influence also seems to have been raised. Her character and position were questions of moment. The matter was the subject of investigation, and there were a great number of depositions made to which I need not refer further than to say that the *status* of the alleged wife and the terms on which she was living with the deceased, and whether as his wife or not, are shown to have been essential

questions for the consideration of the Court in reference to the proof of the will. She proved that she was married to Peter Skerritt in 1823, and the Court no doubt acted on the statement that there was a marriage celebrated between them in 1823. I need not refer to the terms of the decree, but in her allegation in the matter she declares that she was free from all previous matrimonial engagements, or contracts, except with him. I suppose it was a usual plea at the time, but, at any rate, she thereby intimated that she was the lawful wife of Peter Skerritt by reason of a marriage celebrated in 1823, and she never mentioned any other.

Well, he died having, as I have said, had this regular and formal marriage celebrated by a clergyman on his death-bed; the necessary effect and first consequence of which must be that anyone acquainted with the dates must come to the conclusion that his three children were illegitimate. That is the necessary effect of this evidence as regards the marriage. However, she got whatever property passed to her under the will, having obtained probate, and the question as to this annuity did not then crop up. It did become a pressing and urgent matter for consideration, because a suit was instituted in the Court of Equity Exchequer long before, and dragged on till, 1840, and indeed later, till 1842, and it does appear that the lands subject to this annuity and other charges came into the hands of the Court through a receiver, and that the annuity itself fell into considerable arrear. But in 1839, when the eldest boy Thomas was just about of age, the question incidentally arose in the Equity Exchequer, in a suit which was for the purpose of carrying out the trusts of the will of Mary Skerritt, as to who was entitled to this annuity. Most of the family of the Skerritts were parties to that suit, and of course were interested in the issue, and I presume must be taken to have known what had been sworn to in the proceedings eighteen or nineteen years before in the Prerogative Court, as also the facts of the marriage in 1823, of the will of 1823, and of the will of 1821, which described the wife and her two children in a way clearly indicating, or rather stating, that there had, at that time, been no marriage, and that the children were illegitimate. But there was the annuity charged on the lands in favour of Peter

M. R. 1892. M'DONNELL v. ALCORN.

Skerritt, who was long since dead, and his heirs; and though this was not the subject-matter of the suit, the question properly arose for consideration, though not perhaps necessarily for decision, because the lands on which it was charged could not be sold without some ascertainment of the charges upon them; and it was natural that there should be a statement as to the persons entitled to them. And so for the first time, as far as I can see, in 1839, Mrs. Skerritt, who was then Mrs. Connolly (having married a man of the name of Connolly), put forward the case that she had been married to Peter Skerritt in 1818, and she then gave a statement as to the persons who were present at the marriage, and the circumstances under which it was contracted. It was celebrated, she said, by a priest named Father Haynue (who was a friar residing in a monastery in or near Galway), at her own house, and celebrated, no doubt, if at all, before cohabitation. The date of this alleged marriage would establish that Thomas was not illegitimate. One question which occurs is, is it likely that this Mary Lydon would have had such scruples against cohabitation without marriage as to raise a strong presumption that a marriage was celebrated in order to overcome them. It does not appear that this is so, because at the time she had undoubtedly an illegitimate child of thirteen or fourteen years of age. At the time when she says the marriage took place she was in humble circumstances. She could not, all through her life, sign her name. She made the acquaintance of this half-pay lieutenant by reason of her making shirts for him. They undoubtedly lived together, and there is no *prima facie* improbability, so far as I can see, having regard to the circumstances of the parties, and the fact that she had already had an illegitimate child, that she would have consented to live with him as his mistress. I need not say any more on this subject.

Setting out with the fact that she brings forward the case of the marriage of 1818 first in 1839, twenty-one years after it had, according to her story, in point of fact taken place, one must next see under what circumstances the ceremony is alleged to have occurred. In 1839, when she made her case on deposition, she stated that it had been celebrated by Father Haynue. Unfortunately, he was dead at that time, and had been dead for

seven or eight years before, or even nine. But even so, he would have been alive in 1830, and of course alive at the time when the marriage was celebrated by Father Mannion in 1823, and could have been appealed to by any one interested in knowing the truth. She states that there were two witnesses present, one of whom was then living. The other (she said she did not know whether she was alive or dead) was a woman whose name she did not then know (though she remembered her maiden name), and who made no deposition in the case. The first-mentioned witness to the marriage, at least the other person who says he was present, did make a deposition. He appears to have been a man who then looked after the pound in Galway, and earned his living by selling fruit. He says that he was present at the marriage of this county gentleman with the sempstress, and that it took place at her house in Galway. He is the only person who gives evidence as to his being present on the occasion except her son. He was then living with his mother, and he says there was some sort of meeting of persons at the house, a man with a bit of silk on his shoulders—he does not say what kind of silk—the inference intended being that it was a vestment; and being a boy of thirteen or fourteen he says he took no great notice of what was going on; but at night, when a strange man came to stay in the house with his mother, he says he was frightened and began to cry; and some one, called a nurse, told him that his mother had been married to the man on that day. Whether true or not that would have been a natural excuse to make to a boy of his age under the circumstances; that is really the effect of it. But the boy at the time was thirteen or fourteen; and if there had been a Catholic clergyman there, and a marriage, would he not have been able to say so? That is the evidence on which this alleged marriage of 1818 mainly depends.

There is some evidence as to subsequent recognition by neighbours and the like relied on in support of this contention; but it is inconsistent, because while on the one hand the alleged wife produced a number of witnesses, who say that she and Peter Skerritt lived openly as husband and wife, and that the marriage was publicly recognized, and that he entertained his friends as a married man at dinner, she herself disposed of any such case. She said not only

M. R. 1892. M'DONNELL v. ALCORN.

that they did not live openly together as husband and wife but gave the reason why the marriage was kept secret, namely, because his relatives would not have liked it, and being a proud man he himself did not like the thing to be known. Then come to the effect of the marriage which subsequently, undoubtedly, took place in 1823, when the parish priest married them. I have not to go into any question of the canon law as administered in the Roman Catholic Church in relation to discipline. To me, sitting here, it is to a great extent a foreign law as to any purely canonical question. I should require it to be fully discussed if it arose. I do not put this as a question of canon law or ecclesiastical practice, but it strikes one as being common sense, apart from technical rules or ecclesiastical regulations, that a parish priest, if called on to administer the rites of the Church to a man on his death-bed, and finding him living with a woman in what he believed to be concubinage, with three illegitimate children running about the house, whom he himself as parish priest had baptised, would naturally refuse to administer the Eucharist or other rites of the Church until the man either separated himself entirely from his illicit connexion or else married the woman. But it is incredible that neither Peter Skerritt, nor Mary Skerritt or Lydon, if any previous ceremony of marriage whatever had been really performed between them, would have said, "Why, we *are* husband and wife, and we have been living as husband and wife for the last five years, and not only have we been married in a strictly legal way, but by a Catholic clergyman, who married us according to the rites and ceremonies of the Catholic Church to which we both belong." It is incredible that neither one nor the other should have said this, supposing that there had been a former marriage. What suggestion can be given explaining why they did not do so? Mr. Johnston, who ably argued the case for the plaintiffs, and has said all that could be said on this point, has suggested that it must be presumed that the marriage by Father Haynue, being celebrated not by a parish priest but only by a friar, though a priest, was therefore invalid according to the law of the Church. There is no such law that I have ever heard of, nor any suggestion of it in proof. If it took place, as stated, it was as valid a marriage as could have been celebrated—valid according to the law of the land

and in the face of the Church. But, even if it were a doubtful marriage, or even, more than that, if it were a bad and invalid one, why, at least, did not these people in the presence of their parish priest say, in their own defence, "We have made a mistake; we thought we were legally married by Father Haynue, who is now living in this diocese"? Why did not the poor penitent, or the woman whose character for chastity depended on it, say something to this effect? Yet she never pretended that she did. There has been another suggestion put forward to account for their being married again. Her reason is this: she says that as Father Haynue was not a parish priest there would have been no record of the marriage kept, and if matters were left to depend on the marriage of 1818, John Deane Skerritt or some other of the uncles might bastardize the children subsequently. But it does not appear that she ever tried to procure a marriage certificate or inquire whether there was a record of a first marriage in existence. If she had told Father Mannion of the former marriage he would have told her how, even then, to get a certificate of it, as Father Haynue was alive and in the neighbourhood. The matter does not rest there. The story becomes doubly incredible when we find this, that these people who, according to her case, were living as husband and wife at the time, went through a ceremony of marriage, the effect of which must be to render the children *prima facie* illegitimate, and that this was done with the object of preventing their legitimacy from being ever questioned, and of having a marriage certificate to produce. But, as a matter of fact, no record was kept of the marriage which was celebrated by Father Mannion, and none was asked for. Father Mannion gave no marriage certificate, and a search was made amongst his papers after his death for any entry or of the marriage record of 1823, and nothing of the sort was found. Another explanation has been offered by Mr. Johnston: he says you must assume that Peter Skerritt had to confess before he received absolution, and did confess the fact of the prior marriage, &c. Father Mannion, then knowing all about it, thought that it was an irregular marriage, and therefore married them over again. But this supposition is contrary to all the evidence, and to all probability; and I myself, as a matter of common sense, apart from the technicalities of canon law, think

M. R. 1892. M'DONNELL *v.* ALCORN.

that there is no priest in Ireland who, if told that A and B had been regularly married by a priest of his own church, would go through the ceremony again with the effect of casting discredit on the former lawful marriage, and on the sacrament of his own church, and with the direct result of rendering the children illegitimate—those children in whose interest it is to be supposed that the second marriage took place—without some strong reason of which there is neither trace nor suggestion here. Such a reason might exist if, for instance, there was a doubt whether a former husband or wife of either party were alive. Such cases have arisen, necessitating even more than one subsequent marriage. But no such circumstance existed here; neither party had been married before, unless to each other, and no such reason, even if it existed, could account for the omission to mention and openly declare the marriage of 1818. Therefore, as a matter of common sense and evidence, I have no doubt, if there is any reliance to be placed on the ordinary modes of arriving at the truth of disputed facts, that no such marriage as that of 1818 ever took place. If I am not bound by the decision of another Court or by the lapse of time, or by both, I can come to no other conclusion. The story of the marriage of 1818 was started years after its alleged occurrence, by a woman who had already sworn substantially that she was first married in 1823; and years after it would have been essential for her character that it should be made known. It was started contrary to everything that took place in 1823, and contrary to the solemn statement involved in the will of Peter Skerritt in his own handwriting, that up to 1821 no marriage had taken place between him and this woman, and that the children were illegitimate. It was put forward on the evidence of the woman most interested in the matter, and upon her evidence alone, if we except the statement of the fruit-seller. It is to be observed about his evidence that he does not give particulars; and, even if it is correct that he was present at a ceremony of marriage, he is speaking of a transaction which had occurred seventeen or eighteen years before; and it may be conceived that he was really speaking of the marriage of 1823, though I confess I cannot adopt that suggestion. If this question had arisen immediately after the occurrence, could there be any doubt as to what would have happened if any one

of independent judgment had been called on to determine the matter without the intervention of a jury?

The matter, however, did ultimately come before a competent Court, and we must see what took place on that occasion. These circumstances were before the Court in 1839, when a charge was filed in the suit claiming this annuity by Thomas Skerritt, who at that time was about or nearly of age. He afterwards became a lunatic, but that is not now material, as he was successful in his contention at the time on the grounds which I have referred to. Dominick Deane Skerritt was apparently the owner of the estate, subject to the charges, and he also became lunatic and filed a discharge by his committee and next friend, John Joseph Skerritt, who is stated to have been the heir-at-law of Peter Skerritt, supposing that Peter Skerritt's children were not legitimate. The question of the marriage was then raised and I quite admit that the inquiry was within the jurisdiction of the Court if it had proper parties before it, and if they submitted to the jurisdiction. It was convenient, though not necessary, that the question of the right to this annuity should be adjudicated upon, inasmuch as Peter Skerritt's will had not effectually dealt with it and it would therefore go to his heir-at-law. It must, however, be borne in mind that the question only arose incidentally in the suit, as the lands were not to be sold discharged from the annuity but subject to it, and it made no difference, as regards the immediate purposes of the suit, whether the annuity charged upon the lands to be sold was vested in Thomas or in someone else. But it was a matter that the Court might properly ascertain in the suit.

The charge and discharge having been filed, the Court of Equity Exchequer directed an issue to be tried in Galway, in which young Thomas Skerritt was plaintiff and Dominick Deane Skerritt, by his next friend, defendant; the question being whether Thomas was the heir of Peter Skerritt or not, and that no doubt turned on whether there was a marriage in 1818. Amongst other orders in the case there was one, that the parties should be at liberty to get certified copies of the holograph will of 1821, and of the probate of the will of 1823, without the expense of bringing down witnesses. The issue went to trial and the jury disagreed. It was not an unnatural result. They may have thought, "It is a

M. R. 1892.

M'DONNELL v. ALCORN.

hard case. Peter Skerritt married the woman at any rate. It is a hard thing to say that his son is not legitimate. He is a young man and his prospects will be blighted by finding him not to have been born in wedlock." There were a great many jury topics in the case which would have weight in face of everything that might be said on the other side, and even in face of the fact of the celebration of a subsequent marriage by a priest who knew perfectly well that there had been no previous marriage, and in face of the statement of the woman on oath, that she was married in 1823, in her maiden name, and notwithstanding the solemn statement in the will made two years after the alleged occurrence by the man himself, that his children were illegitimate and in spite of the fact that no one had heard a whisper of this ceremony of 1818, until about 1839. These were strong facts, still the matter was before a jury and may have been bewildering to them and they disagreed. Then the matter came up again before the Equity Exchequer, and the Court said in substance that the whole thing was wrong from beginning to end. Here, they said, is a report of the Remembrancer, finding that Thomas Skerritt is entitled to an annuity as heir-at-law, and exceptions have been taken to the report by the owner of the estate, subject to the annuity, who has no interest in the annuity one way or the other. There is no *legitimus contradictor*, and the issue ought not to have been directed. We will decide the matter now so far as it is necessary, and we set aside the exceptions and allow the report to stand confirmed as a report unexcepted to, as there are now no exceptions before us.

The Court accordingly confirmed the report; but how did they do it? "Without prejudice to any original proceeding by any person who may conceive himself entitled to said annuity for recovery of arrears thereof." That is—"We will act on the report which finds Thomas in possession, without prejudicing any claim that may hereafter be put forward to it." This is really what it comes to. They decided the matter as best they could on the materials before them. The effect of the final decree of 1840, however, undoubtedly proceeded on the basis of the validity of the marriage of 1818; and the report stood confirmed, but without prejudice to any claim of title that any other person might set up. What effect, then, has this decree as an estoppel *inter partes?*

Who are the parties to be bound? Dominick Deane Skerritt on the one hand and Thomas on the other. Dominick Deane Skerritt was not bound, as his exceptions had been set aside on the ground that he had no interest in the matter. It is said it was binding on John Joseph Skerritt, or whoever was the heir-at-law of Peter, and that it was binding on him none the less because he, John Joseph Skerritt, was the next friend of Dominick Deane Skerritt, defendant in the issue. I greatly question whether the decree bound him by estoppel at all. Can it be contended that the day after that order was pronounced it was not open to John Joseph Skerritt to originate proceedings to have his claim to the annuity tested, when the very right to do so is reserved by the order? By the decree the Equity Exchequer, while recognizing *prima facie* the right of Thomas, and quieting him in possession, and bearing in mind all such commonplaces as *semper presumitur pro matrimonio*, and the like, meant to leave the matter open for any subsequent proceedings. If there was any estoppel between the parties it must have arisen then, and I am unable to find any such estoppel as would prevent a title to the annuity being set up by any person who claimed a right to receive it. That does not appear to me to be the strongest part of the plaintiffs' case. What strikes me as being most in their favour is that, although there is this reservation in the decree leaving everything open, there were, in fact, no proceedings taken subsequent to 1840 to enforce a right as against Thomas, and he remained till his death in 1880 in enjoyment—in wrongful enjoyment, if I am right—of the charge. It is a strong fact that no claim was set up to the annuity by adverse parties. It might, however, be explained by reference to the circumstances —by good feeling on the part of the family towards this lad, who was not to blame for the misfortune of his birth, especially as that misfortune had been subsequently aggravated by lunacy; by the consideration that it was apparently the only provision for him; and presumedly there may have been a desire not to re-agitate the question at all, but to let it remain as it was. This may have accounted for the circumstance. In the meantime, however, the estate was sold, in 1842, by the Equity Exchequer, and was conveyed to a Mr. Lynch, who was the purchaser of it, and on the face of Lynch's conveyance he had full notice of all the proceedings

M. R. 1892.

M'Donnell v. Alcorn.

which had taken place in the suit; and if he was not a party to the suit, still notice must be imputed to him to the fullest extent, because he had an opportunity of examining, and should have examined before the execution of his conveyance, the proceedings in the case in reference to the estate he was interested in. If there was anything in the nature of a final adjudication or estoppel, I do not see that Lynch was in any different position from the Skerritt family, and particularly from Dominick Deane Skerritt; and if there were any estoppel it would undoubtedly bind him if Dominick Deane Skerritt were bound. It is another question if Gunning, would be bound, supposing such estoppel did exist. The title of Gunning does not arise on an assignment *inter partes*, but on a conveyance of the Landed Estates Court in 1879. It has been for the first time, so far as I know, suggested in this case, and argued, that the assignee of the estate of previous owners under a Landed Estates Court conveyance is bound by reason of privity of title, by equities and estoppels affecting former owners of the lands so conveyed, although not noticed in the conveyance.

It is certainly a startling proposition to put forward at this time of day, that a Landed Estates Court conveyance which, is executed by nobody but the Judge and which operates not as a deed *inter partes*, nor by conveyance of any estate or interest they had had (for it would be equally operative if they had none, and if the whole thing were founded on a mistake), could have this effect. In my opinion it is only necessary to read the words of the 61st section of the Landed Estates Court Act to come to the conclusion that no such contention can possibly prevail consistently with the terms of this section of the Act. Certainly if Lord Justice Christian, who decided *Tottenham's Estate* (1) in most clear language had lived to be made aware that it was contended in 1892 that a purchaser under a Landed Estates Court conveyance was estopped by something affecting the former owner of the lands he had bought: something not on the face of his deed, something which he had never heard of, it would have given him some uncomfortable feelings. However, no authority for such a proposition has been cited, and it is con-

(1) Ir. R. 3 Eq. 528.

trary to the fixed principles on which our Courts are acting every day, viz. that a title in fee-simple under a Landed Estates Court conveyance is absolutely free from all sorts of previous equities; that it sweeps away every such thing, and that the title starts clear from the date of the conveyance by the Court, as if the previous owner had never existed. I therefore think if there was an estoppel against Lynch, it was not carried on against the purchaser under the Landed Estates Court conveyance of 1879, which gave a new and independent title written afresh upon a *tabula rasa*. Whatever doubt there may be whether any estoppel whatever was created by the proceedings in the Equity Exchequer, it is not necessary to decide that question as, in my opinion, no estoppel by privity of estate could exist as against Gunning by reason of the Landed Estates Court conveyance to him.

But it is said that even if there be no estoppel by privity of estate, yet the decision of the Equity Exchequer binds Alcorn, because it was an adjudication by a Court of competent jurisdiction in the nature of a judgment *in rem*, which binds the whole world.

It is equally new to me to hear that a decision in an administration suit, as to who is entitled to an annuity or charge, where there has been a transmission of interest, is a judgment *in rem* binding the whole world. It is the first time it has been suggested; and certainly is a strong proposition, because every day such cases arise in the Chancery Division in which it is often necessary or convenient to ascertain who is entitled, as between the parties to the suit, to charges on the property. It is within the jurisdiction of the Court to do so, and the Court does the best it can to ascertain the respective rights; but it would certainly be a strong thing to hold that the Court, by so doing, prevents the same question from ever being raised by persons who have not had the opportunity of raising it at all, and it is even a stronger proposition that everything incidental decided in the inquiry, even though necessary for its determination, is also once for all conclusively established against the whole world. The truth is that this is not a judgment *in rem* at all. A judgment *in rem* is a judgment by a Court having special jurisdiction over the subject-matter. The

M. R. 1892. M'DONNELL v. ALCORN.

Probate Court has exclusive jurisdiction in reference to the *factum* of wills of personalty; and when it grants probate to an executor no one can afterwards question his position as such, so long as the Probate remains unrecalled. The Bankruptcy Court has exclusive jurisdiction to determine *status* in reference to bankrupts, and even the inferior Courts of Quarter Sessions in England have exclusive jurisdiction with reference to matters that have been given to them by Act of Parliament, such as questions of settlement under the Poor Law Acts, by reason of being the Courts empowered to decide such special matters. Other instances of jurisdiction, the exercise of which constitutes a judgment *in rem*, will be found in Taylor on Evidence, 7th ed., pp. 1401-2. But even as regards cases where such exclusive jurisdiction exists, *The Queen* v. *Inhabitants of Wye* (1) shows that the doctrine of estoppel must not be carried too far and cannot be blindly applied. In that case the question was as to the settlement of paupers who were removed to the parish of Wye by an order of the Justices describing them as man and wife, with their six children, and there was an appeal taken against the order. Pending the appeal the parish officers of Wye instituted a suit in the Ecclesiastical Court for the purpose of having it declared that there was no marriage between these paupers. Afterwards the order of the Justices was confirmed, and on the other hand, the Ecclesiastical Court declared that there had been no valid marriage between the persons in question, the marriage having been within prohibited degrees, and therefore incestuous, which that Court had special jurisdiction to declare. The Court of Quarter Sessions had exclusive jurisdiction on the other point, and there it was held that, under the circumstances, the confirmation of the order of the Justices was not conclusive proof of a derivative settlement in Wye of a seventh child of the paupers, not mentioned in the order, on appeal against an order removing this child to Wye, after the decree of the Ecclesiastical Court, but that, on such appeal, it might be shown by the decree, since the first order, that the marriage had been void *ab initio*. And why was it so held? Because a seventh child had been born who was not mentioned in the order,

(1) 7 A. & E. 761.

while as regards the settlement of the persons included in the order the decision of the Quarter Sessions was final and conclusive against the world. That is how the matter stands as regards estoppel; and if in the present case the legitimacy of Thomas Skerritt were conclusively established, the case cited shows that it does not follow that that of Eleanor is also conclusively set up, there having been no finding as regards her; even though the legitimacy of Thomas depended upon a marriage of 1818, which if proved would also establish the legitimacy of Eleanor. I am of opinion that the owner of this estate is, notwithstanding all that has happened, entitled to see whether or not the plaintiffs are the proper hand to receive this annuity.

Eleanor Skerritt, afterwards M'Donnell, was herself one of the original plaintiffs in this action. The claim is now continued by her executors, and she was the putative sister of Thomas Skerritt. Her case was in effect: "Thomas is dead; his parents were married in 1818. They had only three children. The second, Richard, is dead. He went to America in 1853, and shortly afterwards died, leaving no issue, and I became entitled, on the death of my brother Thomas, as his heiress-at-law, or as heiress-at-law of Peter, my father, and I am entitled to maintain this action." I do not pause to consider the question raised as to the form in which that matter has been pleaded, nor do I go into the question as to what would constitute conclusive proof of the death of Richard without issue. I think *prima facie* proof has been given by the evidence of family repute. But Eleanor herself brought forward this claim a long time back. It was launched by her and her husband in 1883, close on ten years ago, as we are now nearly at the end of 1892; a defence was filed in 1883, denying her title; issue was joined in that year; and till the present nothing has been done further in the matter. Eleanor M'Donnell died in 1887, and the suit, as it now stands, is really one for the arrears of the annuity which accrued in Eleanor's lifetime, and the title to the annuity itself is only to this extent involved. She lived four years after the institution of this suit, and there was nothing to have hindered her from bringing the case to trial during those four years. Sometimes poverty accounts for such delay, but it cannot in this case, because by her will Eleanor M'Donnell disposed of ample assets to have enabled her to go on with the

M. R. 1892.

M'DONNELL v. ALCORN.

suit, and in her will she gives as a reason for making no provision for her son that he had been amply provided for by his father. She never made an affidavit in the case and never in any shape or form, save so far as it is involved in the pleading, pledged her own belief that her mother was the wife or that she was the legitimate daughter of Peter Skerritt, and this circumstance is left wholly unexplained. In this way the case comes before me. It has been charged that it is a speculative action. I do not go into that matter, except to say that I do not decide it on that basis, nor do I think it proved that it was begun for the purpose of extorting money. On the death of Thomas Skerritt, however, the question as to who was entitled to the annuity was at large, and whilst every effect ought to be given to the transactions of 1840, in the Court of Equity Exchequer, as far as they are conclusive, I am unable to see anything in the decision that coerces me to hold that Eleanor was the legitimate daughter of Peter Skerritt, and, apart from estoppel, I am satisfied she was *not*. So far as she is concerned there is no finding that she is entitled, and there is nothing to prevent the owner of the estate demanding proof of her claim by heirship. There has been no decision on that question, and therefore the plaintiffs' case fails.

For these reasons the action must be dismissed, with costs.

R. W. L.

Appeal. 1894.

Feb. 28. March 1, 2.

The plaintiffs appealed to the Court of Appeal.

Piers White, Q.C., Matheson, Q.C., and *Eustace Johnston*, for the plaintiffs.

Serjeant Campion, Q.C., Kenny, Q.C., F. Fleming, for the defendant.

THE COURT OF APPEAL (Walker, C., and Fitz Gibbon, and Barry, L.JJ.), affirmed the decision of the Master of the Rolls, and dismissed the appeal, with costs.

Solicitor for the plaintiffs: *A. Devereux.*

Solicitors for the defendant: *Blake and Kenny.*

G. Y. D.

WOODROOFE *v.* WOODROOFE.

(1893. No. 955.)

M. R.
1894.
Feb. 7, 15.

Will—Construction Death coupled with contingency—Period of contingency —Survivorship.

A testator gave the residue of his property to be divided between his four sons in equal shares, with a proviso that the share of any son dying without leaving issue him surviving should be divided between such of his other sons as should be then living, in equal shares, the children of a deceased son to take the share to which their father would have been entitled. All his sons survived the testator, two having issue, and two being unmarried:—

Held, that the share of each son was defeasible in the event of his dying at any time without leaving issue.

ADJOURNED SUMMONS.

This was an originating summons to determine the following questions arising under the will of the Rev. Abel Woodroofe, deceased, viz.:—

1. Whether the four sons of the testator, named William Woodroofe, Arthur Woodroofe, Henry Woodroofe, and Ernest Woodroofe, having survived the testator, became entitled to his residuary estate absolutely, and in equal shares.

2. Whether the one-fourth share of each of the said four sons in the said residuary estate is defeasible in the event of his death at any time, or only in the event of such death occurring in the lifetime of the testator.

3. Whether the share or shares accruing to any of the said sons by reason of the death of any other son without leaving issue him surviving is or are subject to the same clause of defeasance and accruer as the original one-fourth share, or whether such share or shares vest absolutely in the surviving son or sons and the children of a deceased son equally *per stirpes*.

4. Whether the executors may now distribute the residuary estate of the testator between his said four sons, on obtaining sufficient security from each of them to refund his share in the

M. R. 1894.

WOODROOFE v. WOODROOFE.

event of such share becoming defeasible under the terms of the will of the testator.

The testator, by his will, dated the 24th Nov., 1890, appointed his sons, Arthur, Henry, and Ernest, his trustees and executors. After devising his freehold estate as in the will mentioned, and making certain specific bequests and legacies, the testator devised and bequeathed as follows:—

"I give, devise, and bequeath unto my said trustees and executors all my property, real and personal (other than my said estate of Glandoran Lower), upon trust to get in, realize, and convert into money, as soon as they conveniently can, after my decease; and, after payment of any debts I may owe, upon trust to pay to my son Ernest the sum of £500, he not being in any profession or employment, and to my housekeeper, Anne Cafferky, the sum of £400, to be free from the debts or control of any man she may marry; and upon further trust to divide the residue of my property between my four sons, William Woodroofe, Arthur Woodroofe, Henry Woodroofe, and Ernest Woodroofe, in equal shares; but if any of my said sons shall die without leaving lawful issue him surviving, my will is that the share of such son shall go and be divided between such of my other sons as shall be then living, in equal shares, the children of a deceased son to take the share to which their father would have been entitled."

The testator died on the 31st July, 1892; and, on the 24th August, 1892, probate of his will was granted to his executors. The debts of the testator and his specific bequests were duly paid and satisfied, and the residue consisted entirely of personalty, and stood in the names of the executors in various securities. William Woodroofe, one of the residuary legatees, called upon his brothers, the executors, to distribute the residue in equal shares amongst the residuary legatees. William Woodroofe and Arthur Woodroofe were married and had children, some of whom were still infants. Ernest Woodroofe and Henry Woodroofe were unmarried. All four sons had attained twenty-one years of age.

The executors were advised that they could not safely distribute the residue without the directions of the Court. Accordingly they took out the present summons, making William Woodroofe defendant. The summons was adjourned into Court, and the

general solicitor for minors and lunatics was appointed guardian of the infant children of Arthur Woodroofe and William Woodroofe, to protect their interests.

J. Herbert Shaw, for William Woodroofe :—

The four sons took absolutely on the death of the testator. The words in the will, "dying without leaving issue," mean "dying without leaving issue at the death of the testator." The words, "to get in, realize," and the absence of an investment clause, point to an immediate distribution of the property amongst the four sons at the death of the testator. The word "then" refers to that period of distribution, and this view is strengthened by the clause giving the children of a deceased son the share "to which their father would have been entitled." If the contrary construction is adopted, none of the sons can deal with the property. *O'Mahony* v. *Burdett* (1) is distinguishable. [He cited *Johnson* v. *Smaling* (2); *Olivant* v. *Wright* (3); *Besant* v. *Cox* (4); *Re Hayward* (5); *Re Luddy* (6); *Cripps* v. *Wolcott* (7); *Galland* v. *Leonard* (8).]

Price, Q.C., and *C. Brady*, for the infant children of Arthur Woodroofe and William Woodroofe :—

The share of each son is defeasible in the event of his dying without leaving issue at any time. The word "then" refers to "dying without issue," not to the death of the testator. The words of the will are "to divide between," which is not an express gift. The direction to convert the property is no argument in favour of the opposite contention, nor is the absence of an in-investment clause, which is supplied by statute. [They cited *Farthing* v. *Allen* (9); *Smith* v. *Stewart* (10); *O'Mahony* v. *Burdett* (1); *Bowers* v. *Bowers* (11); *Slattery* v. *Ball* (12); *Palmer* v. *Orpen* (13).]

(1) L. R. 7 H. L. 388.
(2) 26 W. R. 251.
(3) 1 Ch. Div. 346.
(4) 6 Ch. Div. 604.
(5) 19 Ch. Div. 470.
(6) 25 Ch. Div. 394.
(7) 4 Madd. 15.
(8) 1 Swa. 161.
(9) 2 Madd. 310.
(10) 4 De G. & Sm. 252.
(11) L. R. 5 Ch. App. 244.
(12) 40 Ch. Div. 11.
(13) [1894] 1 L. R. Ir. 32.

M. R. 1894.

Serjeant Jellett, *Q.C.*, and *W. M. Jellett*, for the executors.

WOODROOFE v. WOODROOFE.

Feb. 15.

THE MASTER OF THE ROLLS :—

The will in this case is not a long document, and the passage on which the question turns is comprised in a very short compass. [THE MASTER OF THE ROLLS read the will.]

The question is whether the words, "die without leaving lawful issue him surviving," refer to a death at any time, or are to be confined to death before the testator. If the latter be the correct meaning the contingency cannot happen, as all four sons have survived the testator; and therefore all would now be absolutely entitled to their respective shares. If the former view be correct, none of the shares is absolutely vested, since the divesting condition may occur in relation to at least three of them; and no rule of law stands in the way of adopting either construction, if the language requires it.

When death is spoken of by a testator as a contingent event, and if the words import no other contingency, then, since death is an event which must happen to all, the time of it alone being uncertain, the Courts have long treated the time of death as being the contingency contemplated, and, for want of a reference to any other time, have construed the will as referring to death before the testator. Thus such common expressions as "in the event of his death," or "if he should die," or "in case of his dying," and the like, without more, have been always held to mean dying before the testator. This construction, however, is only adopted *ex necessitate*, and because the will treats a certain event as uncertain, thus introducing the uncertain element of time, and no other time than the death of the testator can be supposed to be in view.

But whether this rule was originally sound or not there is plainly no reason for its application where some other contingency is in express terms connected with the event of death; as, for instance, where the event is not merely the death of A B, but the event for instance of his dying before C D, or dying under twenty-one, or dying without leaving lawful issue him surviving; for these are all events to which language of contingency is strictly and properly applicable, and there is therefore no need to suppose,

or imply, a reference to any other contingency than that which is expressed. This canon of construction is now firmly settled, even where a previous life estate has been conferred upon someone else. *O'Mahony* v. *Burdett* (1) has placed this beyond controversy, finally disposing of the fourth rule in *Edwards* v. *Edwards* (2). In the present case of course that question does not arise, there being here no previous life estate.

Still the question must be, in each case, what is the meaning of the words used? for the will is that of the testator. In the present case the first thing to be observed is that the fund is to be "*divided*" between the four sons; and it is argued that this involves payment to them, and that if once paid the money could not be recovered back on a subsequent contingency, thus indicating that the contingency must be one which would or would not happen, once for all, before division, that is before the death of the testator. The word is "divide," not "divide and pay." Even the latter expression might not be conclusive, though it would found a stronger argument than that arising from division which may mean merely setting apart, without actual parting with the possession. And in *Bowers* v. *Bowers* (3) the word "divide" was held not sufficient to indicate that the contingency must necessarily happen in the lifetime of the testator.

In *O'Mahony* v. *Burdett* (1) Lord Cairns says:—"In the absence of any authority to the contrary, I should entertain no doubt that the decision of the Court of Chancery in Ireland was in accordance with the true interpretation of the will. A bequest to A, and if she shall die unmarried or without children, to B, is, according to the ordinary and literal meaning of the words, an absolute gift to A, defeasible by an executory gift over, in the event of A dying, at any time, under the circumstances indicated, namely, unmarried or without children. And, in like manner, a bequest to X for life, with remainder to A; and if A die unmarried or without children, to B, is, according to the ordinary and literal meaning of the words, an executory gift over, defeating the absolute interest of A, in the event of A dying, at any time, unmarried or without children." And after a full discussion of the

(1) L. R. 7 H. L. 388. (2) 15 Beav. 357. (3) L. R. 5 Ch. App. 244.

M. R. 1894.

WOODROOFE v. WOODROOFE.

authorities, which renders it now useless to examine those which were prior to *O'Mahony* v. *Burdett* (1), he says:—"I am unable to find, in any case prior to *Edwards* v. *Edwards* (2), any authority that the words introducing a gift over in case of the death unmarried or without children of a previous taker do not indicate, according to their natural and proper meaning, death unmarried or without children at any time, or that this ordinary and literal meaning is to be departed from otherwise than in consequence of a context which renders a different meaning necessary or proper." Lord Hatherley says, at p. 404:—"I apprehend, my Lords, that the rule referred to by the Master of the Rolls may be more correctly stated in somewhat the reverse way to that in which it was stated by him in the case of *Edwards* v. *Edwards* (2), namely, that the period to which the executory devise will be referred will be the period of the death of the first taker, unless there are other circumstances and directions inconsistent with that supposition." And to exactly the same effect is the decision of the House of Lords in *Ingram* v. *Soutten* (3), which immediately follows *O'Mahony* v. *Burdett* (1) at p. 408.

Recurring, then, to the will before me, if the contrary intention is not to be found in the word "divide," where are we to find it? Not assuredly in the fact that the debts and two legacies are to be at once paid. The reason for giving Ernest, who is one of the four residuary legatees, a special legacy of £500 is that he was not in any profession or employment, and presumably to equalize his position with that of his brothers. If this be so, they had already received the equivalent for this £500. The words "then living" can only mean "living at the death of any son who should die without leaving lawful issue him surviving." No other time is mentioned to which they can possibly apply. No doubt every will must be permeated by the idea of the testator's own death. But though this idea is tacitly before his mind, it cannot be introduced as an epoch by which to fix dates and times contrary to his own clear language. It is quite certain that in this context "then" cannot mean either "at the time of my death" or "at the period of distribution."

(1) L. R. 7 H. L. 388. (2) 15 Beav. 357. (3) L. R. 7 H. L. 408.

Taking it, then, to refer to the death of the son without issue, the gift over is to the other sons living not at the death of the testator, but at the death of another person. If we were to suppose that this latter must be a death in the lifetime of the testator, then the result would be absurd, giving the property to persons who might all predecease him, and that in a clause framed to meet the case of one or more possible deaths in his lifetime. Giving the words their natural meaning, there is no inconsistency or difficulty in the way, the reference being to a death at any time.

The remaining clause was strongly relied on by the four sons. [THE MASTER OF THE ROLLS read the last clause.] It was said that the words, "the share to which their father *would have been* entitled," show that the substitutionary gift must have been meant to take effect before any interest vested in the testator's sons, that is to say, before the testator's death; since, if it applied to a death afterwards, the words should have been "*was* entitled," and not "*would have been.*"

But I think this is a misconstruction of the language. Grammatically, and in its natural meaning, the sentence refers to the accruing shares. The testator gives his four sons vested interests. Each share is to be divested if the son dies at any time without issue surviving. In that event his share is to go to his brothers *then* living, but if any of them should be then dead leaving children, these children are to stand in his place as regards the division of the accruing share. Their father's own share had of course vested indefeasibly by his having children. I confess the whole provision is to my mind very clear. It is not necessary for me to pronounce any opinion as to what would have happened if one of the four sons had died in the testator's lifetime leaving children. If such an event is unprovided for (and I by no means say that it is), it is only another instance of the numberless cases in which the most obvious possibilities are left out of account by will-makers.

I need not dwell long upon the cases. Before *O'Mahony* v. *Burdett* (1) they were conflicting, and the law was in an unsatisfactory state. Since that decision the rule has been clear, and the only difficulty lies in applying it. In *Olivant* v. *Wright* (2),

(1) L. R. 7 H. L. 388. (2) 1 Ch. Div. 346.

M. R. 1894. WOODROOFE v. WOODROOFE.

O'Mahony v. *Burdett* (1), and *Ingram* v. *Soutten* (2) were distinguished on the words of the will, which are very different from those before me.

The will there was:—"I give and bequeath unto my husband all my real and personal property, during his natural life, to receive all the rents, interests, and profits for his own use; and after his decease to be divided amongst my five children, share and share alike; and if any of my children should die without issue, then that child or children's share shall be divided, share and share alike, among the children then living; but if any of my children should die leaving issue, then that child (if only one) should take its parent's share, and if more than one, to be divided equally amongst them, share and share alike." James, L.J., says, at p. 349:—"The will says, 'If any of my children should die without issue, then that child or children's share shall be divided, share and share alike, among the children then living.' The natural meaning of the word 'then' would be the time of the division, which was before spoken of as to be made at the death of the tenant for life; and according to the plain and natural meaning of the words, this can only mean that immediately after his decease the executors and trustees are to see that her property is actually divided among her five children. In my opinion there is throughout this will only one division contemplated. The whole of the will seems to be as plain and reasonable as any scheme of a will can be. There is to be a division at the death of the tenant for life, and every event which can occur at the death of the tenant for life is provided for. All is consistent with the intention that there is to be a final division." Mellish, L. J., says:—"I think it is quite clear that by the word 'divided' the testatrix meant that the executors were actually to divide the property, and that the *corpus* of the property, real and personal, was to be actually handed over and given to the children or their issue, as the case might be. That seems to me to be quite clear by the difference in the description as to how the property is to be enjoyed during the lifetime of the tenant for life, and how it is to be enjoyed afterwards. The tenant for life is only to receive the

(1) L. R. 7 H. L. 388. (2) L. R. 7 H. L. 408.

rents, interests, and profits, and is not to have the *corpus*, but after his decease it is to be divided among the four children. If when the executors come to the division they find one of the children is dead, and is dead without leaving issue, they are to divide his share among the other children who are then alive, but if any of the children have died leaving issue, then that issue will take the parent's share. All appears to me to point to one period of division, whereas, according to the argument on the other side, there might be several periods of division; and what is to happen if all of the five children, one after the other, die without leaving issue, does not exactly appear?"

In *Bryant* v. *Cox* (1) Malins, V.-C., whose attitude on this question was somewhat reactionary, as shown in *Johnson* v. *Smaling* (2), held that the words, "depart this life without leaving lawful issue," referred to death without issue at the death of the tenant for life; but the words were different from those before me. There was there, as in *Olivant* v. *Wright* (3), a prior life estate, to the termination of which the Vice-Chancellor thought the words in question had reference. I may say in passing that, with all respect, I cannot entirely follow the reasoning of the learned judge in that case as conclusive. Granting that the leaning of the Courts is in favour of early vesting, I am unable to think that the mere fact of property being tied up, within legal limits, must necessarily negative the construction which would lead to that result. To do so would be to overrule *O'Mahony* v. *Burdett* (4) and *Ingram* v. *Soutten* (5). In *Re Hayward* (6) that rule was recognised; but Fry, J., thought that the words before him took the case out of it.

The words there were, "I direct my trustees to invest the residue of the money arising from the conversion of my property in any of the securities hereinbefore mentioned, and to hold such last-mentioned investments (and after the death of my wife the money and securities held to answer the provision for her) and all arrears and accumulations of interest and income on trust for the children of Mrs. Edward Lingwood, to be divided equally between

(1) 6 Ch. Div. 604.
(2) 26 W. R. 251.
(3) 1 Ch. Div. 346.
(4) L. R. 7 H. L. 388.
(5) *Ibid.* 408.
(6) 19 Ch. Div. 470.

M. R. 1894. WOODROOFE *v.* WOODROOFE.

them as tenants in common, whether male or female. In case of the decease of either of them leaving a family, then such share as the parents would have taken shall be equally divided amongst the children of such deceased parents."

It will be observed that the words "then living" do not occur in that will; nor is there any gift over in the event of a legatee dying without leaving issue him surviving. There was nothing there to explain or qualify, or indeed to apply, the words, "such share as the parent would have taken," except in the way the will was construed. It was in this respect a comparatively plain case. So in *Re Luddy* (1) the direction to convey the property to testatrix's son absolutely was held sufficient to show that if he survived the testatrix he was to be indefeasibly entitled.

Kay, L.J., there says, at p. 398:—"The primary object of the bounty of the testatrix, so far as the disposition of the residue was concerned, was plainly her son. He was to have a conveyance and assignment of such residue to himself absolutely if he survived her. That I must take to be the paramount intention. It seems to me improper to put such a construction upon the trust for the children as would make it impossible ever to make a conveyance and assignment to the son; and I feel, therefore, compelled to come to the conclusion that in this will, death leaving children means death in the lifetime of the testatrix, and, that not having happened, the son became entitled absolutely, subject to the debts and annuities."

On the other hand, *Bowers* v. *Bowers* (2), to which I have already referred, is nearer to the present case than any other. There Lord Hatherley and Giffard, L.J., laid down the law as it was four years later stated and determined in *O'Mahony* v. *Burdett* (3).

The words of the will there were:—"To divide the whole" (viz. the residuary estate as here) "unto, between, amongst my four children, share and share alike, as tenants in common, and not as joint tenants, with benefit of survivorship in case any of them should die without issue; and in case any of my said children should die leaving any child or children, then I direct that the

(1) 25 Ch. Div. 394. (2) L. R. 5 Ch. App. 244. (3) L. R. 7 H. L. 388.

share, whether original or accruing, of him, her, or them, so dying shall go, belong, and be divided between such children in equal shares, if more than one, and if only one, then the whole to such one and only child." Lord Hatherley says, at p. 248 :—"Here the interests are given in words which, it may be at once conceded would, if taken alone, carry the whole interest, and make the estate divisible among the children absolutely. Then there are two classes of contingency contemplated, deaths of children without issue and deaths of children who leave issue; and the plain and natural meaning of the language appears to me to be, that the testator intended to divide a division of his property into as many parts and shares as he had children, with an appropriation of one of those parts to each of those children; but, remembering that each of those children might die without children, he provided that if a child should at any time die without issue, then that child's share or shares should go over to the survivors, and that if a child should at any time die leaving issue, then both the share which came to the parent under the original disposition, and the share which might come to him by reason of his being a survivor, should go to his children."

Giffard, L.J., says, at page 250 :—"If we take the whole together, first of all there is, no doubt, an absolute gift to the trustees, with a direction to get in the money and securities, and divide the whole among the testator's four children, as tenants in common, with benefit of survivorship, in case any of them should die without issue. But the will does not stop there: the testator goes on to say—'And in case any of my said children should die, leaving any child or children, then I direct that the share, whether original or accruing, of him, her, or them so dying, shall go, belong, and be divided between such children in equal shares, if more than one, and if only one, then the whole to such one and only child.' It is obvious that every one of those expressions relates to the direction to divide, and that the direction to divide is not to be construed as a direction to divide immediately among the four children, but to divide among the four children in manner thereinafter mentioned, that is, subject to the following provisions. There is quite enough to cut down that which, taken by itself, might be considered as an absolute and complete gift."

M. R.
1894.
WOODROOFE
v.
WOODROOFE.

I am of opinion that the shares of the four sons are subject to a defeasance in the event of each respectively dying at any time without leaving lawful issue him surviving, and that therefore they are not now indefeasibly vested.

Solicitors for William Woodroofe: *Whitney & Co.*
Solicitor for the children of Arthur and William Woodroofe: *Baker.*
Solicitor for the executors: *Overend.*

W. L.

Appeal.
1894.
Jan. 29.

IN THE GOODS OF AMBROSE, DECEASED (1).

Subpœna to lodge a testamentary paper—Service out of the jurisdiction—20 & 21 Vict. c. 79, s. 31.

The Probate Division has no jurisdiction in matters where an action or suit is not pending to order service out of the jurisdiction of a subpœna on a person resident in England, to bring into a Probate Registry a testamentary paper.

MOTION on behalf of the National Bank, who claimed to be creditors of the deceased, for liberty to serve on Thomas J. Ambrose, who resided at Birmingham, a subpœna to bring in and lodge the will of James Ambrose. James Ambrose died on the 25th April, 1884, having previously made his will, whereby he appointed his brother Thomas Ambrose and his son Thomas J. Ambrose executors. Thomas Ambrose handed the will to Thomas J. Ambrose, who had gone to reside at Birmingham, and had neglected to lodge the will. An affidavit was made by E. Fisher the manager of the branch of the National Bank at Newcastle West, in the county of Limerick, who stated that he believed that the original will was in the possession of Thomas J. Ambrose. The

(1) Before WALKER, C., and FITZGIBBON and BARRY, L.JJ.

President of the Probate Division refused the application, and from that order the Bank appealed.

Appeal. 1894. *In re* AMBROSE.

Herbert Wilson, in support of the appeal :—

The President of the Probate Division made no rule on this application on the authority of *In re Dowling* (1), but intimated that if the applicants instituted an action to prove the will in solemn form, he would give leave to issue and serve a subpœna *duces tecum* to produce the will at the trial under the jurisdiction conferred by 17 & 18 Vict. c. 34. The appellants are only creditors of the deceased, and it would be impossible for them to attempt to prove in solemn form a will which they have never seen, and about which they can obtain no information. In addition, such a proceeding is expensive, and the estate is insolvent. The Registrar of the Probate Division in England is in the habit of ordering service out of the jurisdiction of subpœnas in such cases, and the sections of the English Probate Acts are identical in terms with those of the Irish Acts. The Judge has jurisdiction, first, under the Probate Acts, to make the order, sects 29, 30, 31, and 42 of 20 & 21 Vict. c. 79 ; and s. 19 of 22 & 23 Vict. c. 31 ; Smith's Probate Practice, p. 67. In *Bagot* v. *Bagot* (2) the Judge held that the Probate Division has jurisdiction to issue subpœnas to witnesses in any part of the United Kingdom, irrespectively of the Judicature Act. In *Ross* v. *Burke* (3) it was held that the Probate Court had jurisdiction to order a subpœna to issue to compel the attendance of a witness resident in England or Scotland. This followed the English practice. In *Underwood* v. *Darracott* (4) it was held that the Court of Chancery had power under 17 & 18 Vict. c. 34 and 21 & 22 Vict. c. 27, to order a subpœna to issue to witnesses residing in England and Scotland.

In *In re Dowling* (1), Warren, J., held that he had no jurisdiction to direct the service of a subpœna to lodge a will on a person residing out of the jurisdiction; but he intimated that if a suit were instituted to propound the will a subpœna *duces tecum* to produce the will could be issued. That decision seems to be

(1) 3 L. R. Ir. 184.
(2) 1 L. R. Ir. 1.
(3) Ir. R. 6 Eq. 328.
(4) Ir. R. 8 Eq. 348.

Appeal. 1894.

In re AMBROSE.

founded on *Power* v. *Webber* (1), which was an application to issue a subpœna to produce documents upon the hearing of a claim in Chambers before the Chief Clerk.

The Judge has jurisdiction, secondly, under the Judicature Acts, sects. 5, 6, 21-26; Ord. XI., R. 10; Ord. XXXVII., Rr. 6 and 19. See Annual Practice of 1894, p. 130, and p. 142 for the practice under 17 & 18 Vict. c. 34.

WALKER, C.:—

The President of the Probate Division in this case has been kind enough to send us a memorandum of the reasons which influenced him in refusing the application (2). We have also communicated with the Senior Registrar of the Probate Division in England for the purpose of ascertaining if such orders are made there, and he has informed us that in one or two cases applications to issue a subpœna have been made to the Registrars under section 23 of the Probate Act of 1858, addressed to a person out of the jurisdiction, and that with hesitation these applications have been granted; but he could not say that it was the established

(1) Ir. R. 10 Eq. 188.

(2) This was an *ex parte* motion by a creditor of the deceased for a *subpœna duces tecum* of an alleged will, to be served on Thomas J. Ambrose, who is resident at Birmingham.

The motion was founded on the Probate Act of 1857, section 31, and being of opinion that I had no authority to make such an order, I refused the application. Having decided the same point on previous applications, and in one reported case, I did not on this occasion state the reasons for my decision, nor did I consider whether on the hypothesis that I had general authority to make such an order, it was shown, in the words of section 31, that the will was in the possession or under the control of Thomas J. Ambrose, or whether, if I had a discretion in the matter, I ought to have exercised that discretion in making the desired order under the circumstances of the case.

It is not the practice of Courts of Justice to make orders which they cannot enforce. Taylor says truly, sect. 1137:—"Writs of subpœna have no force at Common Law beyond the jurisdictional limits of the Court from which they issue"; and as Lush says:—"Before the 17 & 18 Vict. c. 34, there was no means of compelling the attendance of witnesses who were out of the jurisdiction."

The Act 17 & 18 Vict. c. 34, after reciting the *want of power* of the Superior Courts of Law, to compel the attendance of witnesses resident in one part of

practice under sect. 26 of the Probate Act of 1857, or sect. 23 of the Act of 1858; and it does not appear that any such orders have been made in Court. We think we ought not to interfere with the practice which we find existing in the chambers of Warren, J.; and, furthermore, I think he was right, because the power of enforcing the attendance of witnesses out of the jurisdiction is a statutory jurisdiction. That was first conferred, so far as the Superior Courts are concerned, by 17 & 18 Vict. c. 34, which provided by sect. 1, that, "If in any action or suit in the Superior Courts of Common Law it shall appear to the Court in which such action is pending, or if such Court is not sitting to any Judge of any of the said Courts, respectively, that it is proper to compel the personal attendance at any trial of any witness who may not be within the jurisdiction of the Court in which such action is pending, it shall be lawful for such Court or Judge to order that a writ of *subpœna ad testificandum*, or of *subpœna duces tecum*, or warrant of citation shall issue commanding such witness to attend." Before the Judicature Act such a power was exercised by the Court of Chancery only when the power conferred upon the Court of Chan-

the United Kingdom at a *trial* in another part, enacted sect. 1, that in any action or suit in the Superior Courts of Common Law, the Judge *in his discretion* might order a *subpœna ad testificandum*, or *subpœna duces tecum* to issue in special form, commanding a witness to attend a *trial*, wherever he should be within the United Kingdom; and the 3rd sect. provided means for enforcing the attendance of the witness at such trial.

The power of the Court of Probate to order *subpœnas duces tecum* to be served in England depends on this Act, and the extension of its provisions by the Probate and Judicature Acts, and it is now the settled practice of this Division (and of the Chancery Division) to make orders in *actions* for *subpœnas duces tecum*, and *ad testificandum* to be served on witnesses in England and Scotland, directing their attendance at *trials* in Ireland: *Darracott* v. *Underwood* (Ir. R. 8 Eq. 348); see also *Hunt* v. *Anderson* (L. R. 1 P. & D. 476). But in Ambrose's case the question was whether the Court of Probate is authorized to direct service of *subpœnas* on persons in England where there is neither an action depending nor a trial arranged; the words of the enabling Act limit its operation to cases—1, in which there is an *action* depending; 2, a *trial* of such action; and 3, it is *proper to compel* the attendance of the witness; but here there is no action, or trial to be mentioned in the order, and it is not possible to compel where there is no power of compulsion.

Appeal. 1894. *In re* AMBROSE. Walker, C.

cery by Lord Cairns' Act of trying a case before a jury had been resorted to. In this particular case, the 41st and 42nd sections of the Probate Court Act expressly conferred the same powers on that Court, but only when the Court shall have ordered a case to be tried before itself by a jury. And that seems to be a condition precedent to its existence. Taking sects. 29, 30, and 31, of the Act of 1857, sect. 29 empowers the Court to require the attendance of any party in person or of any person whom it may think fit to examine in any suit or other proceeding in respect of matters or causes testamentary, or may examine or cause to be examined upon oath or affirmation parties and witnesses by word of mouth .... and the Court may by writ require such attendance, and order to be produced before itself or otherwise any deeds, evidences, or writings, in the same form, or nearly as may be, as that in which a writ of *subpœna ad testificandum* or *subpœna duces tecum* is now issued by any of the Superior Courts of law. But there is no power in the Court to issue a *subpœna duces tecum* to a person where there is no suit or other proceeding. Section 31 provides that whether any suit or other proceeding shall or shall not be pending in

The Vice-Chancellor has held, at least in two cases, that he has no power to issue a *subpœna* to a witness in England in cases where there was not to be a trial, albeit there was an action: *Power* v. *Webber* (Ir. R. 10 Eq. 188). In *Dowling's Case* (3 L. R. Ir. 184) I held that there must be an action and a trial to give jurisdiction. I was of opinion that I could not change the words of the Probate Act, section 31, "order any person to produce," by inserting the words "whether within or without the jurisdiction of the Court," there being no means to enforce obedience in the latter case; such words would extend the jurisdiction to the cases of persons resident in Asia, Africa, or America, as well as in England. Judge Keatinge or I have never made such an order; such orders have been made in the English Registry, but, as far as I have been able to ascertain, not by the Court or with the sanction or by the direction of the Court. I annex a copy of a letter of Mr. Registrar Hannen on the subject.

I wish to add that the production of the will is not necessary for the purposes of the creditor who has moved.

The creditor may proceed by citation, which may be served in any country (I refer to Probate Form No. 29); and, if the executor shall not choose to lodge the will, and the next-of-kin, who are known to the creditor, shall not desire administration, he will be given a grant according to the settled practice of this Division.

the Court with respect to any probate or administration, the Court may order any person to produce and bring into the Principal or any District Registry, or otherwise, as the Court may direct, any paper or writing being, or purporting to be, testamentary which can be shown to be in his possession or control; and if it can be shown that he has knowledge of any such paper or writing, the Court may direct such person to attend for examination or to answer interrogatories; and in case of default he shall be subject to the like process for contempt as if he were a party to the suit. But the fact of the punishment being the same does not make the power of compelling the attendance of the party the same. That power is expressly derived from sect. 42, which gives to the Court of Probate the same jurisdiction and powers with respect to a trial, as belong to a superior Court of Common Law or to the Court of Chancery, and as an incident to such a trial. There may have been good reason for the omission in such a case as the present. Even in Courts of Common Law, the Court will exercise a discretion; and it may well be that it would not be reasonable to call a witness from England or Scotland merely because it was stated that he had a document in his possession or knew of a document. The President of the Probate Division has decided this motion in accordance with what has been the practice in his Court for a long time, and we are of opinion that he was right.

The Lords Justices concurred.

Solicitor for the applicants: *Dunne.*

R. D. M.

V.-C.
1894.
Jan. 30.

Appeal.
March 2.

HILLIARD *v.* MORIARTY.

(1885. No. 7781.)

Costs—Administration suit—Sale of mortgaged property—Proceeds insufficient to pay mortgage debt—Other assets insufficient to pay costs—Costs of sale.

In a creditor's suit for administration, the property of the deceased was sold in lots, some of which were subject to a mortgage. The mortgagee, who had not proved as an ordinary creditor, and was returned in the Chief Clerk's certificate only as an incumbrancer, was aware that the property was to be sold, and gave assistance in reference to title, &c. The lots subject to the mortgage did not realize sufficient to pay the amount due to the mortgagee, and the remainder of the assets was insufficient to pay the costs of suit, including those of the sale:—

Held, by the Vice-Chancellor, that a proportionate part of the costs of the sale should be paid out of the amount realized by the sale of the lots subject to the mortgage.

Held, by the Court of Appeal (reversing the decision of the Vice-Chancellor), that no part of the costs of the sale should be borne by the proceeds realized thereby.

In a creditor's administration action the ordinary rule is that a mortgagee does not lose his priority by consenting to a sale of premises mortgaged to him by the deceased, nor does he thereby undertake to pay the costs of the sale in the event of there being a deficiency.

Application on Summons by the plaintiff that on allocation, out of the sum of £635, representing the purchase-money of lots 1 and 2 in the particulars and conditions of sale, the sum of £62 9*s.* 1*d.*, being proportion of the costs of sale of premises sold, be set aside to be paid to the plaintiff for the costs of realizing the said sum of £635.

This was a creditor's suit for administration of the real and personal estate of Jonathan Moriarty. The property was put up for sale in four lots, and realized, lot 1, £455; lot 2, £180; lot 3, £300; and lot 4, £215. The purchaser of lot 3 applied to be discharged. His application was refused, and expense was incurred by the plaintiff to compel him to carry out his purchase, which he

ultimately failed to do; and there being an arrear of rent greater than the value of the interest, ejectment proceedings were taken by the landlord and he recovered possession.

By the Chief Clerk's certificate it was found that lots 1, 2, and 3 were subject to a mortgage vested in the Hon. E. A. de Moleyns, on which there was due, including a salvage claim for rent paid, £650 2*s.* 1*d.*

The Hon. E. A. de Moleyns did not prove as an ordinary creditor, nor value his security; he was returned only as an incumbrancer on lots 1, 2, and 3, and was aware the property was to be sold.

An affidavit of Mr. Mac Gillycuddy, one of the solicitors for the plaintiff, stated that not considering it certain that there would be any surplus on the sale of lots 1, 2, and 3, after paying the amount due to the mortgagee, he discussed the matter with him, and suggested that he should contribute towards the costs of sale. The Hon. E. A. de Moleyns did not actually promise, but he did not decline to do so, and he gave assistance in the preparation of the rental and making title. He also desired the application of the purchaser of lot 3 as to his discharge to be opposed, and made an affidavit for the purpose.

In October, 1893, Mr. Mac Gillycuddy wrote to the mortgagee a letter, in which occurred the following passages:—"The sum realized by the sale of the premises not charged with your mortgage is insufficient to pay the costs of the suit and of the sale of all the premises including those charged with the mortgage. You may remember that some years ago we mentioned to you, when it was contemplated proceeding to a sale, that we should expect you to contribute towards the costs of sale, inasmuch as it was being carried out more in your interest than that of Hilliard. We did not at the time understand you to dissent from this view. . . . Of course if the mortgagee had been a stranger we would have had a binding agreement before we embarked in those sales from which our client Hilliard might get no benefit. . . . We hope you will tell Mr. Rooke to agree to what we are asking for, which is really only carrying out the arrangement which we all along considered was well understood between us."

The Hon. E. A. de Moleyns made an affidavit, in which he

V.-C. 1894.

HILLIARD v. MORIARTY.

stated that it was not, so far as he recollected, suggested, prior to the sale of lots 1, 2, and 3, that the proceeds would be insufficient to discharge the moneys due to him, nor did he ever consent to contribute to the costs of the sale of the said premises in the event of the proceeds of the sale being insufficient to meet his demand, nor was there any understanding to that effect.

The costs of suit, including the costs of sale, were £257 8*s*., and the funds in Court, not including the proceeds of lots 1 and 2, were insufficient to pay same. The proceeds of lots 1 and 2 were not sufficient to pay the amount due to the mortgagee.

Of the plaintiff's costs, £83 12*s*. represented those connected with the sales, and dividing this sum in the proportion which the proceeds of lots 1 and 2 bore to those of lot 4, £62 9*s* 1*d*. was the amount referable to the realization of the former.

Morphy, in support of the application, cited *White* v. *Gudgeon* (1); *Dighton* v. *Withers* (2); *Leonard* v. *Kellett* (3).

Arthur C. Meredith, for the Hon E. A. de Moleyns :—

The mortgagee did not prove as an ordinary creditor; his claim was merely as an incumbrancer; he derived no benefit from the sale which was had in the interest of the general creditors, and he is entitled to receive the entire proceeds of the sale of the mortgaged property: *Ross* v. *Ross* (4); *Hepworth* v. *Heslop* (5). The case of *Dighton* v. *Withers* (2) was cited in *Ward* v. *Mackinlay* (6), where the observations of Turner, L.J., p. 363–4, are in favour of the mortgagee. In *Leonard* v. *Kellett* (3) the mortgagee was plaintiff, and the sale was at his instance. In *Wonham* v. *Mackin* (7) Lord Romilly, M.R., says, p. 448, he is of opinion that no distinction can be drawn between the costs of suit and the costs of sale. Further, as to the alleged agreement to contribute towards the costs, no such is proved.

[The VICE-CHANCELLOR intimated that there was no agreement, and that the case must depend on the question of law.]

(1) 30 Beav. 545.
(2) 31 Beav. 423.
(3) 27 L. R. Ir. 418.
(4) 29 L. R. Ir. 318.
(5) 3 Ha. 485.
(6) 2 D. J. & S. 358.
(7) L. R. 10 Eq. 447.

Morphy, in reply:—

V.-C. 1894. HILLIARD v. MORIARTY.

Ross v. *Ross* (1) does not apply. There the mortgagees valued their security; the property realized less than the value they put upon it, and the sale was had in the interest of the general creditors. *Leonard* v. *Kellett* (2) was not referred to in *Ross* v. *Ross* (1). All the cases on the subject are reviewed in the judgment of this Court in the former case.

THE VICE-CHANCELLOR:—

I adhere to the opinion I expressed in *Leonard* v. *Kellett* (2), where I considered carefully the cases on the subject, and the general rules to be deduced from them. The rule I acted on there was that in an administration suit by a mortgagee, where there is a sale of the mortgaged property, the mortgagee cannot claim to be paid in priority to the costs of suit.

There is no inconsistency between *Leonard* v. *Kellett* (2) and *Ross* v. *Ross* (1). In the latter case I decided that where a mortgagee valued his security, and the plaintiff was not satisfied with the valuation and proceeded to sell, and the premises realized less than the value put on them, the plaintiff was not entitled to be paid his costs of sale out of the proceeds. There the sale was had for the benefit of the other creditors. Here the mortgagee came in under a posting for incumbrancers. He is a party to the sale, and I therefore hold that he must contribute out of the proceeds of the mortgaged premises to the costs of sale.

D. M'C. M.

Appeal. 1894. March 2.

The mortgagee subsequently applied *ex parte*, and obtained from the Vice-Chancellor special leave to appeal, pursuant to the Judicature Act (Ireland), 1877, sect. 54 (3).

(1) 29 L. R. Ir. 318. (2) 27 L. R. Ir. 418.

(3) In the Court of Appeal, before WALKER, C., and FITZ GIBBON and BARRY, L.JJ.

Appeal. 1894.

HILLIARD v. MORIARTY.

Stanley, Q.C., and *Meredith*, for the appellant.

Morphy, for the respondent.

The arguments used were the same as those reported in the Court below.

WALKER, C. :—

We think this order cannot be sustained. The preponderance of authority is in favour of the appellant; and in my opinion the decision in *Dighton* v. *Withers* (1) forms a good illustration of the familiar saying about "hard cases." Lord Romilly says, at p. 425 :—"Though it may be a very hard case where a person institutes a suit for administration, and is not aware of the state of the assets, yet the rule is as I have stated, and the utmost I can do in this case is to give the costs of the sale, and which the mortgagee would have had to incur if he had instituted a suit to realize his security out of the fund." That is, he gives these costs not so much as a matter of principle but rather as a thing which it was not unreasonable to do in that particular case. Here, too, Mr. Morphy tried to rely on the special facts of the case. But the letter of Mr. MacGillycuddy almost amounts to a statement that he had no legal claim, and I can see nothing to fix liability on the mortgagee beyond his mere consent to these premises being sold. In one sense this course was for the benefit of the mortgagee; but it was also for the benefit of the creditors. If the mortgagee's consent to the sale had not been obtained the property would have been much less advantageously sold. I think the creditors had more to gain by the course adopted than had the mortgagee. No loss, from his giving his consent, should therefore fall on the mortgagee. The balance of authority is in favour of what the learned Vice-Chancellor himself decided in *Millar* v. *Johnston* (2), *Ross* v. *Ross* (3), and *Leonard* v. *Kellett* (4).

We shall vary the order by declaring that no part of the costs of this sale shall be borne by the proceeds realized thereby.

(1) 31 Beav. 423.
(2) 23 L. R. Ir 50.
(3) 29 L. R. Ir. 318.
(4) 27 L. R. Ir. 418.

FITZ GIBBON, L.J. :—

The ordinary rule seems to be that in a creditor's administration suit the mortgagee does not lose his priority by consenting to a sale of premises mortgaged to him by the deceased, nor does he thereby undertake to pay the costs of the sale in the event of there being a deficiency. There is no apparent reason why money or value, which would otherwise belong to him, should be spent upon the attempt of puisne owners to realize something for themselves, merely because he allowed them to make the attempt.

There are no circumstances in this case which take it out of the ordinary rule. Mr. Mac Gillycuddy's letter shows the real state of affairs. He states that in consequence of the Hon. Mr. de Moleyns not being a stranger, he had got no binding agreement from him, and, without agreement, the costs of the sale cannot be thrown upon the mortgagee.

BARRY, L.J., concurred.

Solicitors for the plaintiff: *Mac Gillycuddy & Morphy.*
Solicitors for the Hon. E. A. de Moleyns: *Rooke & Co.*

G. Y. D.

IN THE MATTER OF THE BELFAST SHIPOWNERS COMPANY (LIMITED), AND THE COMPANIES ACTS, 1862 TO 1867.

V.-C.
1893.
Dec. 4, 5.

Appeal.
1894.
Jan. 12.

(1893. No. 428.)

Company—Winding-up—Injunction to restrain proceedings in foreign Court—Submission to jurisdiction—Companies Act, 1862 (25 & 26 *Vict. c.* 89) *sections* 87, 122, 163.

The petitioners, in a winding-up under supervision, instituted proceedings in the Superior Court of Massachusetts to attach certain sums, representing cargo freight, then in the hands of a third party in Boston, and the property of the Company, for the purpose of acquiring, under the law of Massachusetts, a lien on the freight, which would give the petitioners priority over the other creditors of the Company. The petitioners were British subjects, carrying on

V.-C. 1893.

In re Belfast Ship Owners' Co.

business in London, and also, up to a short time before the matter came before the Court, in Ireland:—

Held, that they should be restrained from further prosecuting the proceedings in the American Court.

Motion by the petitioners that an order made at Chambers on the 21st November, 1893, might be varied by omitting therefrom the portion which directed that the petitioners be restrained from prosecuting in the Courts of Massachusetts, U.S.A., the proceedings instituted by them to attach for their own benefit the amount of the freight earned by the ship Cavehill, and from putting in force any attachment, sequestration, distress, or execution against such freight.

The order of the 21st November, 1893, was made on the application of the liquidator, grounded on an affidavit which set out the following facts:—

An extraordinary resolution to wind up the Company was passed on the 5th May, 1893.

Messrs. Galbraith and Moorhead, who were the managers of the Company, carrying on all its business, and discharging the duties of secretary, presented a petition to the Court, and on the 13th June, 1893, an order was made to continue the voluntary winding-up, under the supervision of the Court, and appointing a liquidator.

At the date of the resolution for winding-up, the petitioners were the largest creditors of the Company, their claim being for money due to them as managers of the Company, and made up of items connected with a steamship called the China, which had been sold, and a sailing ship called the Cavehill, the property of the Company at the time of the winding-up.

The Cavehill had been mortgaged to Workman, Clarke & Co., who, prior to the resolution to wind-up, served notice on the Company and the consignees of the cargo, that they, as mortgagees, entered into possession of the ship and freight.

At the dates of the notice and resolution the Cavehill was on a voyage to Boston, where she arrived on the 22nd May after the filing of the petition.

On her arrival the Cavehill was seized under an attachment

issued at the instance of the petitioners out of the Superior Court within and for the Commonwealth of Massachusetts, the object of the proceeding being to give the petitioners a lien on the ship for their claim, which would have priority over the claims of the other creditors. Workman, Clarke & Co. having, however, asserted their rights as mortgagees in possession, the seizure was withdrawn.

Workman, Clarke & Co. subsequently sold the ship by auction in this country for a sum more than sufficient to discharge their mortgage debt, but they had not yet accounted to the liquidator for the balance, as they had not received the freight accounts from Boston, owing to the circumstances following:—According to the law of Massachusetts a creditor can, before judgment, arrest any property of his debtor that he can lay his hand on, and hold it to discharge any claim he can establish against the debtor. Messrs. Lombard and Sons of Boston, as agents for Workman, Clarke & Co., collected the freight on the Cavehill cargo, which, not being required for payment of the mortgage debt, formed part of the property of the Company for the benefit of the creditors; but the petitioners instituted proceedings against Messrs. Lombard to attach the freight in their hands. These proceedings were still pending, but the liquidator cautioned the petitioners not to continue them, stating that every opportunity would be afforded the petitioners in the winding-up of proving their claim, and establishing, if they could, any preferential right to any portion of the assets.

The liquidator was advised that he had not at present any *locus standi* in the American Court, and that even if he obtained permission in the winding-up to apply for leave to intervene, it was doubtful whether the American Court would allow him to do so.

The petitioners did not obtain any leave in the winding-up to institute or carry on the proceedings in America, the result of which might be to give them a preference over the other creditors.

The Company was registered in Ireland; the Cavehill was registered in Belfast; and the petitioners were British subjects having offices in Belfast and London.

The liquidator was advised that, according to American law, the petitioners had no maritime lien, and that the lien obtained

V.-C. 1893.

In re Belfast Ship Owners' Co.

by the proceedings referred to was a lien such as any American subject can obtain in Massachusetts for any debt due him where his debtor has property in that State.

The petitioners did not appear on the liquidator's application, expecting, as they now alleged, that the case would have been adjourned.

The following order was made :—

"It is ordered that Messrs. Galbraith and Moorhead, the petitioners in this matter, be, and they are hereby restrained from further prosecuting in the Courts of Massachusetts, United States of America, the proceedings instituted by them for the purpose of attaching, for their own benefit, moneys belonging to the above-mentioned Company, and from applying for, or putting in force, any attachment, sequestration, distress, or execution against the estate or effects of the Company in such State of Massachusetts. And it is ordered that the said liquidator be at liberty to take such steps as he may be advised by counsel for the recovery of the possession of such effects. And for such purpose it is ordered that the said liquidator be at liberty, if so advised, to apply for liberty to intervene in the said proceedings in Massachusetts."

An affidavit now filed on behalf of the petitioners stated that the amount due to them, which exceeded £6000, represented the balance of advances and disbursements made by them for account of the Cavehill. The petitioners alleged that they did not carry on business in Belfast, nor had they any business office there, after the 31st October, 1893.

Piers F. White, Q.C. (with him *Wright, Q.C.*, and *Herbert Wilson*), in support of the motion :—

Section 163 of the Companies Act, 1862, must be read with, and is controlled by sects. 85 and 87: see Buckley's Companies Acts (6th Ed.), p. 396; sects. 87 and 163 apply only to the Courts in these countries, and do not relate to proceedings in foreign Courts: *ibid.* p. 255. The mere fact that a person who takes proceedings in a foreign Court may be within the reach of this Court is not a sufficient ground for interfering: Kerr on Injunctions (3rd Ed.), p. 583. Moreover, even where there is jurisdiction to interfere, this Court ought not to do so where it appears likely to be more conducive to justice, or where upon the balance of convenience and inconvenience it appears desirable

that the foreign proceedings should be allowed to take their course; if, for instance, this Court desires to ascertain what the foreign law is: see Kerr, p. 582. That is the case here. See also 1 Seton, Judgments and Orders (5th Ed.), p. 625. *Moor* v. *Anglo-Italian Bank* (1); *M'Henry* v. *Lewis* (2).

Gordon, Q.C., and *J. H. Moore*, for the liquidator:—

The argument for the petitioners omits to regard the fact that this is the case of a Company. The order of the 13th June relates back to the resolution. Moreover, the petitioners were the managers of the Company, and had offices in Belfast up to the end of October, and they still carry on business in London. Sect. 122 of the Companies Act, 1862, enables the order of this Court to be enforced in England. A proceeding against a Company in respect of property in a foreign country is within sect. 87: see Buckley, p. 255; *In re South Eastern of Portugal Railway Co.* (3). An injunction may be granted to restrain the carrying on of proceedings in foreign Courts: Daniell's Ch. Pr. (6th Ed.), p. 1579. Moreover, this Court can make an order *in personam*, though it affects property abroad: *Paget* v. *Ede* (4). See also *In re Oriental Inland Steam Co.* (5), which is directly in point; *In re North Carolina Estate Co.* (6); *In re Thurso New Gas Co.* (7). The petitioners' rights should be decided in the winding-up: *In re Australian Direct Steam Navigation Co.* (8). Here the applicants themselves presented the petition in this matter, and they thereby subjected themselves to the jurisdiction of this Court. See *Griendtoveen* v. *Hamlyn* (9). *Moor* v. *Anglo-Italian Bank* (1) does not apply. That was a case in which there was an already existing charge on land in Italy, and the Courts of that country were the proper tribunals in which to proceed to raise such charge.

(1) 10 Ch. Div. 681, 686.
(2) 22 Ch. Div. 397.
(3) 17 W. R. 982.
(4) L. R. 18 Eq. 118.
(5) L. R. 9 Ch. 557.
(6) W. N. 1889, p. 53.
(7) 42 Ch. Div. 486.
(8) L. R. 20 Eq. 325.
(9) 8 *Times'* Rep. 231.

V.-C. 1893.

In re Belfast Ship Owners' Co.

Wright, Q.C., in reply :—

The statement in Buckley, p. 255, that the Court has jurisdiction to restrain a British subject from taking proceedings in a foreign Court is grounded solely on one case, *In re North Carolina Estate Co.* (1), of which only a three-line note is given in the *Weekly Notes*, and which is not reported elsewhere. That case is of little value as an authority. *In re International Pulp and Paper Company* (2) rests on sections 87 and 122, the latter making an English order enforceable in Ireland. *In re Oriental Inland Steam Company* (3) was a peculiar case, and the Scinde Company had undertaken to abide by any order made: see also the judgment of Sir G. Mellish, L.J., at p. 559. In *Moor* v. *Anglo-Italian Bank* (4), Jessel, M. R., says (p. 690) :—"*Prima facie* this Court cannot interfere to restrain that proceeding. The Court of the country must be assumed to know more about the law of its own country than the Court of a foreign country, and the risk of miscarriage in this Court if it undertook to administer Italian law would be much greater than in the Courts of Italy, who are, of course, more familiar with their own law; and as all parties can appear in that Court and have their rights finally settled, it appears to me it would be in the highest degree inconvenient for this Court to interfere at all, more especially when, to use an English phrase, the Italian Courts first had seisin of the matter, and have had seisin of it for some two or three years now past. On this ground also I should feel myself quite unable to accede to the present motion."

Dec. 5.

The Vice-Chancellor, having referred to the facts, continued :—

The sale in Belfast having produced more than sufficient to pay off Messrs. Workman, Clarke, and Company, the freight remained in the hands of their agents, Messrs. Lombard & Sons, *in usum jus habentis*. The supervision order was made on the 13th June, and George Johnston was thereby appointed liquidator. The freight remained the property of the Company attached by

(1) W. N. 1889, p. 53.
(2) 3 Ch. Div. 594.
(3) L. R. 9 Ch. 557.
(4) 10 Ch. Div. 681.

this order, and the liquidator was bound to get it in. I hold that Messrs. Galbraith and Moorhead, by presenting the petition, submitted themselves to the jurisdiction of this Court for all purposes. The question of their lien is not for me to decide at present. The present question is whether this Court has power to restrain them from further prosecuting the proceedings taken by them in the American Court to attach the moneys received for freight.

In re Australian Direct Steam Navigation Company (1) decides that the proper mode of enforcing a maritime lien on a vessel of a Company ordered to be wound up is by a proceeding in the winding-up, and therefore this Court is the proper tribunal to decide whether the petitioners had a lien on the freight or not. The question is, are they to be allowed to catch by anticipation the money received by Messrs. Lombard as against the other creditors?

The Act of Parliament is plain. Questions have arisen, where a person takes two different proceedings, as to the power of the Court to interfere and stay one of them, and there have been doubts how far the power should be exercised. I understand the result to be that there is jurisdiction to interfere; but that in a case of double proceedings where one of the proceedings is in a foreign country, the Court is slow to exercise the power except under special circumstances. But that is quite different from the case here, which is not one of double or vexatious proceedings, but one in which I am called upon to exercise the power expressly given by the statute. Section 85 enables the Court, after the presentation of a petition, and before making an order for winding-up, to restrain further proceedings in any action, suit, or proceeding against the Company. This section provides for circumstances happening between the presentation of the petition and the order for winding-up. The 87th section provides for the period subsequent to this transition period. The proceedings taken by Messrs. Galbraith and Moorhead come exactly within the provisions of that section: they are proceedings after the order for winding-up under supervision, for the express purpose of getting hold of the property of the Company. Section 163 provides that where a Company is being wound up by the Court or subject to supervision, any attachment, sequestration, distress, or execution put in force against the

(1) L. R. 20 Eq. 325.

V.-C. 1893.

In re Belfast Ship Owners' Co

estate or effects of the Company after the commencement of the winding-up shall be void to all intents; and if this were a proceeding in this country there could be no question about it, for it comes within the very words of that section.

It is said that I ought not to make the order as there is, it is alleged, no means of carrying it out. This Court, of course, has not the power to restrain or interfere with any foreign Court, but it may act *in personam* against persons interfering with a proceeding for winding-up in which they are parties or claimants. It was relied on that the petitioners are no longer resident in Ireland; but there are two answers to this objection—first, section 122 provides for enforcing an order of this Court in England by the means directed by the next section; secondly, I hold that by presenting the petition here Messrs. Galbraith and Moorhead submitted to any order I might make for all purposes of the winding-up. Their position differs in no material respect from that of the Scinde Railway Company in the winding-up of the *Oriental Inland Steam Company* (1), which is an authority that a party coming in submits himself to the jurisdiction of the Court.

The Court does not interfere in such a case as *Moor* v. *Anglo Italian Bank* (2), where the subject-matter was land in Italy. There was there no question as to the general jurisdiction, which was tacitly admitted; but as the only means of realizing the incumbrance was by proceedings in the country where the property was situate, the Court did not consider it expedient to exercise its jurisdiction. That case does not affect the general rule.

I am of opinion that *In re Oriental Inland Steam Co.* (1) is precisely applicable to the case before me. It shows that the Court, in a winding-up proceeding, has the fullest jurisdiction to prevent parties from interfering with the assets of the Company in a foreign country, and that one creditor cannot be allowed to get priority over the other creditors by reason of having got possession of the assets.

Therefore, without going more fully into the authorities, I am of opinion that I should refuse the application.

D. M'C. M.

(1) L. R. 9 Ch. 557. (2) 10 Ch. Div. 681.

Messrs. Galbraith and Moorhead appealed (1).

Piers F. White, Q.C., and *Herbert Wilson*, for the appellants:—

Sects. 87 and 163 of the Companies Act of 1862 apply only to Courts in this country: *Re Oriental Inland Steam Co.* (2). An incumbrancer on immoveable property in a foreign country, who has instituted legal proceedings in that country for the purpose of enforcing his rights, will not be restrained by injunction, if the other party may appear before the foreign tribunal and assert his rights: *Moor* v. *Anglo-Italian Bank* (3); *Re The Missouri Steamship Co.* (4). The judgment would place us in the position of a secured creditor in the American Court. We submit that we are entitled to proceed in the American Court, and then we can work out our rights in the liquidation: *Re South Eastern of Portugal Railway Co.* (5). The Court ought not to restrain us before judgment: *Re Central Sugar Factories of Brazil* (6).

Gordon, Q.C., and *J. H. Moore*, for the liquidator:—

These creditors have not only submitted to the jurisdiction, but they have invoked the aid of a Court of Equity by filing a petition. Under those circumstances they should be restrained, as they can get their rights in the Irish liquidation: *Re Australian Direct Steam Navigation Co.* (7). *Moor* v. *Anglo-Italian Bank* (3) was a case of real estate, which is governed by the *lex loci*, though a Court of Equity has jurisdiction over lands out of the jurisdiction: *Paget* v. *Ede* (8).

WALKER, C.:—

In this case we are all of opinion that the decision of the Vice-Chancellor should be affirmed, and the appeal dismissed, with costs. It appears that this is an Irish Company, registered in Ireland; it is an Irish winding-up, and the parties are Irish creditors. The appellants are Messrs. Galbraith and Moorhead,

(1) In the Court of Appeal, before WALKER, C., PALLES, C.B., and FITZGIBBON, L.J.
(2) L. R. 9 Ch. 557.
(3) 10 Ch. Div. 681.
(4) 42 Ch. Div. 321.
(5) 17 W. R. 982.
(6) 10 *Times'* Rep. 150.
(7) L. R. 20 Eq. 325.
(8) L. R. 18 Eq. 118.

Appeal. 1894. *In re* Belfast Ship Owners' Co. Walker, C.

one of whom is a director and the other is the manager of the Company, and on the 5th May a resolution for a voluntary winding-up was made. Galbraith and Moorhead presented a petition to obtain a compulsory winding-up, with the result that an order was made for a winding-up under the supervision of the Court. By reason of that, the jurisdiction of the Court has been attracted, and the Court has jurisdiction to decide the question. The effect of the order of the 13th June was that the Court has complete jurisdiction and control over the assets of the Company, relating back to the 5th May, with a trust attaching upon the assets for all the creditors, the substance of which is equality. The only variation in that equality is to see—Is there some existing charge or judgment, which would disturb the equality at the time of the winding-up? And where such do exist at the date of the winding-up, the Court will not disturb the existing legal *status*. That being so, what happens in the result is that all the assets should be divided among the creditors, including this freight in question, which was due to the liquidator, and should be received by him. The freight arose out of the earnings of this vessel, the Cavehill, which, at the time the petition was presented, or, at all events, at the time the winding-up order was made, was on a voyage from Calcutta to Boston: it was earned, and was *prima facie* due to the liquidator. The ship arrived at Boston on the 27th May, and these petitioners, the creditors in respect of this debt, having got judgment for the benefit of all the creditors, proceeded on a date not fixed to take proceedings in an American Court to realize for themselves this freight, which belonged to the liquidator. There may be some rule of American law which may possibly enable the appellants to assert here a preference in the winding-up proceedings, because Mr. White's argument was, Allow us to get this judgment in the Court at Boston, to which we are entitled by American law, and we shall work it out in the winding-up.

It is perfectly plain that a suit in section 87 of the Companies Act of 1862 is not a suit previously instituted in a foreign tribunal; but it is quite another thing if a man comes in and gets a winding-up order for the benefit of the creditors, whether the Court will allow him afterwards to institute a suit in an American Court and to get a judgment, the effect of which may be to upset the whole

proceedings here, and to disturb the equality, and the trust which have been created by the winding-up order. I think it is against those first principles upon which, acting *in personam*, the Court proceeds, whether in a winding-up, or an administration suit, or any other proceeding.

The cases referred to do not seem to me to affect the question. *Moor* v. *Anglo-Italian Bank* (1), is consistent with what we are now deciding, and is an affirmance of it. It lays down that if a man has real property in a foreign country, the *lex loci rei sitæ* will apply, and you must proceed according to that law. There the only mode in which the property could be realized was by the Italian suit, and the Court allowed it to proceed in the country where the property was situated, and allowed the property to be realized in that suit, because it appeared that the money would be available for distribution among the creditors. *In re The Australian Direct Steam Navigation Company* (2) also follows the same rule. There Baker, a master, had a claim for master's wages. That created a maritime lien—the suit for master's wages creates a maritime lien now more than ever since the Act of 1890—and an action *in rem* against the ship for wages was restrained, and the effect would have been the same, if the master, Baker, had proceeded in a foreign Court against the ship, because if the claim was not complete he could not be allowed to make it so, after a winding-up order had been obtained. But Sir George Jessel also said that if this gentleman had this lien, which he asserted that he had, and by virtue of which he instituted the action *in rem* against the ship, it might be asserted in the winding-up matter. And so, in this case, if Mr. White's client has such a claim as is asserted here, he will have a chance of ascertaining it in a proper *forum*, namely, that in which the assets are to be distributed.

In my opinion the only proper *forum* is the Irish Court for the distribution of this property, where these creditors came in and sought to have the jurisdiction of the Court exercised.

(1) 10 Ch. Div. 681. (2) L. R. 20 Eq. 325.

Appeal. 1894. *In re* Belfast Ship Owners' Co.

Palles, C. B.:—

I am of the same opinion. Although section 87 does not include Courts in foreign countries, I am of opinion that the Court, under its general jurisdiction, was competent to make an order against the appellants *in personam*, such as that now under appeal. The appellants, although resident in England, are clearly liable to this jurisdiction, as the Company is an Irish one, which can be wound up in this country only, and the appellants are the petitioners upon whose application the winding-up was directed to be continued under supervision.

The only real question in the case is, not that of the jurisdiction, which is undoubted, but of its exercise. The extraordinary resolution, under which the Company is now being wound up under supervision, was passed on the 5th May last, and thereupon a trust was constituted for the benefit of all the creditors. At the time this trust attached upon the property of the Company, the "Cave Hill" was at sea on a voyage from Calcutta to Boston, at which latter port she did not arrive until the 22nd May, when she was seized under the appellants' attachment. It is undoubted that the assets of the Company are to be distributed according to the law of this country, and it is equally clear that the freight of the "Cave Hill," although it became payable in a foreign country, became subject to the statutable trust for creditors. *Sill* v. *Worswick* (1); *Hunter* v. *Potts* (2); and *Selkrig* v. *Davies* (3), although decided upon cases of assignments in bankruptcy, are equally applicable to cases under the Winding-up Acts. The trust having so attached, the appellants proceed to institute a suit in Boston, for the purpose of withdrawing the freight from that statutable trust, and having it applied, contrary to the law of this country, to payment in full of their own demand, in priority to those of the other creditors who by law are entitled to be paid *pari passu* with the petitioners. Now, if the suit proceeds in the American Court, and if the liquidators were permitted to intervene (which, at least, appears doubtful), and, even if the American Court adopted the same view of international law as does this country, and held that the question should be determined by Irish law, still

(1) 1 H. Bl. 665, 691. (2) 4 T. R. 182. (3) 2 Dow, 230.

there would exist the objection to the petitioners being allowed to prosecute that suit which was held effectual in *Moor* v. *Anglo-Italian Bank* (1). "The Court of the country," says Sir George Jessel (p. 690), "must be assumed to know more about the law of its own country than the Court of a foreign country; and the risk of miscarriage in this Court, if it undertook to administer Italian law, would be much greater than in the Courts of Italy, who are of course more familiar with their own law." Were there nothing else in the case, it would, I think, follow that the appellants ought not to be permitted to proceed with the foreign suit.

There is, however, much more in the case, because it would seem that the law of Massachusetts differs from our law as to the title under the statutable trust prevailing against the subsequent American attachment. The matter is put thus in Story's Conflict of Laws, 5th Ed., sect. 409. In England "the following propositions are firmly established:—First, that an assignment under the bankrupt law of a foreign country passes all the personal property of the bankrupt locally situate, and debts owing in England; . . . . Third, that in England the same doctrine holds under assignments by her own bankrupt laws as to personal property and debts of the bankrupt in foreign countries; Fourth, that, upon principle, all attachments made by foreign creditors after such assignment in a foreign country ought to be held invalid; . . . . Sixth, that, at all events, a British creditor will not be permitted to hold the property acquired by a judgment under any attachment made in a foreign country after such assignment." Mr. Story then proceeds:—"There is no inconsiderable weight of American authority on the same side, but it must be admitted that the preponderating authority is certainly now the other way"; and in section 410 he mentions as the ground of the American doctrine: "It must be admitted that the general rule is that personal property, including debts, has no locality, but follows, as to its disposition and transfer, the law of the domicile of the owner: but every country may, by positive law, regulate as it pleases the disposition of personal property found within it, and may prefer its own attaching creditors to any foreign assignee; and no other country has any right to question the determination."

(1) 10 Ch. Div. 681.

Appeal. 1894. *In re* Belfast Ship Owners' Co. Palles, C.B

In result, then, it appears, not only that the proceeding has been taken to prevent the freight being applied according to our law, and to dispose of it in a mode which that law deems a misapplication, but that such proceeding, if permitted to continue, will probably result in such misapplication. If the suit in America continues, and if, under a decree made in it, the appellants recover on foot of their debt more than their just proportion, the Courts of this country must give effect, as against the appellants, to their own law, and compel them to give up the surplus.

The distinction between the present case and *Moor* v. *Anglo-Italian Bank* (1), which I have already referred to for another purpose, is that there the subject-matter of the foreign suit was land, and the question was therefore to be determined by the *lex loci rei sitæ*. Here it is personal property which according to the law of this country is governed by the law of the domicile.

The appeal should be dismissed with costs.

Fitz Gibbon, L. J., concurred.

Solicitors for the appellants: *G. D. Fottrell & Son.*
Solicitors for the liquidator: *Carson & M'Dowell.*

R. D. M.

(1) 10 Ch. Div. 681.

IN RE VAHY, A BANKRUPT (1).

Appeal.
1893.
June 26, 27, 28.
July 28.

Bankruptcy—Arranging debtor—Protection order—Declaration that petitioner should not part with his estate—Accountant taking possession under resolution of the creditors—Contempt of Court—Jurisdiction—Bankrupt and Insolvent Act, 1857, *ss.* 343, 344—*Bankruptcy Amendment Act*, 1872, *sect.* 68.

A trader presented a petition to the Court of Bankruptcy, stating that he was unable to meet his engagements with his creditors, that he desired to lay the state of his affairs before them, under the control of the Court, and submit himself to the jurisdiction thereof; that his embarrassment was due to losses resulting from bad debts and depression of trade. The petitioner then declared that he submitted himself to the jurisdiction of the Court, and prayed that an order might be made protecting his person and property from process, and that any arrangement which he might make with his creditors might be executed under the direction of the Court. On hearing this petition the Court made two orders of the same date, one drawn up on paper and the other on parchment. The former decreed that the person and property of the petitioner should be protected until a day named, or until further order; and having arranged, amongst other formal matters, for holding a private sitting and a preliminary meeting, directed the petitioner not to make any payment or part with any portion of his property, except for the ordinary purposes of his trade, without the sanction of the Court, and that he should not (except as aforesaid) give possession of, or part with, any portion of his property to any person other than the official assignees or messenger of the Court, without like sanction. The parchment order simply declared that the person and property of the petitioner was protected from process till a day named, or until further order.

The petitioner failed to attend the preliminary meeting of his creditors, which was accordingly adjourned. At the meeting it was resolved that, pending the adjournment, a firm of accountants should enter into possession of the estate. A member of the firm who had knowledge of the order of the Court, acting under this resolution, took possession of the estate. The adjourned meeting was then held, and the matter was turned into bankruptcy:—

Held, affirming the decision of Miller, J. (*diss.* Barry, L.J.), that the member of the firm taking possession of the estate of the petitioning trader was guilty of contempt of Court.

Per Barry, L.J., that the part of the order which declared that the trader

(1) Before WALKER, C., and FITZ GIBBON and BARRY, L.JJ.

Appeal. 1893. *In re* VAHY.

should not part with the possession of his goods to any person except the officers of the Court was made outside the jurisdiction conferred by the 343rd section of the Act of 1857; that there was no undertaking to abide by it binding on the firm of accountants, and that, though the taking possession may have been illegal, it was not a contempt of Court.

APPEAL from an order of the Hon. Judge Miller, declaring Mr. Robert Gardner guilty of contempt of Court in taking possession of the property of Patrick M. Vahy while the same was protected by an order of the Court of Bankruptcy.

The order appealed from is fully set out and the circumstances under which it was made are stated at length in the judgment of the Lord Chancellor.

Serjeant Dodd and *Carton, Q.C.*, for the appellant.

Kenny, Q.C., *Roche, Q.C.*, and *Campbell, Q.C.*, for the assignees.

The arguments appear fully in the judgments.

Cur. adv. vult.

July 28.

WALKER, C. :—

This case has been argued with great energy and considerable heat, which apparently was a reflection of the warm temperature of the discussion and the judgment in what is usually the cool atmosphere of the Bankruptcy Court.

The appeal is brought from an order of Judge Miller, made in the matter on the 26th May last, whereby it was declared that "Mr. Robert Gardner (Craig, Gardner & Co.) committed a contempt of this Court by taking possession on the 23rd April, 1892, of the property of the said Patrick M. Vahy while the said property was protected by the order of this Court. The Court doth however refrain from attaching the said Robt. Gardner for his said contempt but doth order him to lodge with the official assignees acting in this matter within twenty-one days after the amount shall have been ascertained (as hereinafter directed) the money belonging to the said Patrick M. Vahy, which he obtained possession of after he wrong-

fully took possession of the said property of the said Patrick M. Vahy on the said 23rd April, 1892, and doth order him to pay to the assignees their costs of the examination of witnesses in this matter rendered necessary by his said wrongful action, and the costs of this application when taxed. It is referred to the Chief Registrar to ascertain the amount of the money belonging to the said Patrick M. Vahy, which the said Robert Gardner obtained possession of after he took possession of the property of the said Patrick M. Vahy on the said 23rd April, 1892."

Vahy appears to have been a trader in Claremorris. On April 6, 1892, he presented a petition to the Court of Bankruptcy, which stated—1, that he was unable to meet his engagements with his creditors; 2, that he desired to lay the state of his affairs before his creditors under the control of the Court, and to submit himself to the jurisdiction thereof, according to the provisions of the statutes; 3, that the true cause of such inability to meet his engagements arose from losses by bad debts, and dulness and depression of trade. The petition concluded with the following prayer:—"Your petitioner therefore submits himself to the jurisdiction of this honourable Court, and humbly prays that his person and property may be protected from process until further order, and that such proposal as he may be able to make to his creditors for the future payment or compromise of his debts or engagements, and which shall be agreed to by them, may be executed under the direction of this honourable Court."

This petition was verified by the affidavit of the petitioner, made in the usual form. On April 6, 1892, the petition came before the Court, and thereupon it was ordered "that the person and property of the said petitioner" should "be protected from process until the 29th day of April, 1892, or until further order"; that a private sitting should be held, at which the petitioner should submit his proposal; that the petitioner should furnish accounts, lodge the sum of £5 with Mr. M'Intyre, who was appointed the official assignee, and call a preliminary meeting of his creditors; that the petitioner should "not make any payment, or part with any portion of his property except for the ordinary purposes of his trade or business, without the sanction of this Court," and that he should "not give the possession of his property, or any part thereof

Appeal. 1893. *In re* VAHY. Walker, C.

(except as aforesaid), to any person other than the official assignees, or messenger of this Court, without the like sanction." On the same date another order was made, the curial part of which was to this effect:—"It is ordered that the person and property of the said Patrick M. Vahy shall be protected from process from the date thereof, until the 29th day of April, 1892, or until further order." This latter order was drawn up on parchment, and was meant to be a short form to present to the sheriff in the event of any creditor seeking to realize his debt by an execution.

It appears that a Mr. Jenkinson, an assistant of Mr. Gardner's, had gone to Claremorris on April 7, 1892, to look into the bankrupt's affairs, and had returned to Dublin on the 16th of the same month.

Three subsequent orders were made on April 12, April 22, and May 3, by which the period of protection was extended. The preliminary meeting of the creditors was to be held on April 21. This meeting was summoned pursuant to General Order 133, which prescribes that "within one week after the petitioning creditor has obtained his order for protection, he shall, unless the Court otherwise directs, call a preliminary meeting of his creditors, to be held at the office of his solicitor, or other fit place, to consider the affairs of the debtor, of which four days' previous notice, by post, prepaid, shall be given to each of his creditors, and to the solicitor of any creditor who shall have taken proceedings against him, and the debtor shall personally attend such meeting."

But before considering what was done at that preliminary meeting let us see what are the powers of the Court of Bankruptcy in arrangements, and the consequences of invoking the jurisdiction of that Court in such matters. Section 343 of the Bankruptcy Act of 1857 is the one under which the petition was presented. It enacts that "any such trader unable to meet his engagements with his creditors, and desirous of laying the state of his affairs before them, under the control of the Court, and of submitting himself to the jurisdiction of the Court in manner hereinafter mentioned, may present a petition to the Court setting forth the true cause of such inability, and praying that his person and property may be protected from process until further order; and the Court on such petition shall have power to grant such protec-

tion, and may renew the same from time to time as it shall think fit." Section 344 provides "forthwith after the granting of any order for protection, the Court shall appoint a private sitting to be held at such time as it may name, and upon sufficient cause shown may, if it think fit, direct that the estate and effects of the petitioner, or any part thereof, shall be possessed and received by the Official Assignees, or be taken possession of by the messenger of the Court." Nothing was done in this case under this section. Further powers are given to the Court by section 68 of the Act of 1872. It enables the Court to restrain legal proceedings against an arranging debtor, and concludes with a provision which enables the Court at any time after the presentation of the petition to appoint a receiver or manager of the property or business of the debtor, or any part thereof, and to direct immediate possession to be taken of such property or business, or any part thereof.

After the decision of *O'Callaghan's Case* (1) in this Court, the Court of Bankruptcy adopted the form of order made in this case on the application of Vahy. As I read it this order is an order made upon certain terms to which the debtor submitted; one of these terms—a most reasonable one—being that when a man invokes the protection of the Court for his goods, he shall not himself dissipate those goods, but preserve them for his creditors. I think the order is also justifiable as being made within the statutory jurisdiction under the 68th section of the Act of 1872. It seems to me to follow by way of corollary that when the Court may appoint a receiver to take possession of the debtor's goods, it may also do that lesser thing, namely, allow the debtor himself to remain in possession, but on the terms that he is not to part with his property except in the manner specified in the order.

When the day for the preliminary meeting of the creditors, April 21, came round, the creditors met, but the debtor was not present; accordingly it was not a preliminary meeting within the General Order 133, which directs that the debtor shall attend. How many of the creditors were there does not appear, but what took place at the meeting is best shown by Mr. Davoren's circular

(1) 19 L. R. Ir. 32.

Appeal. 1893. *In re* VAHY. Walker, C.

of April 21. This circular was sent to the creditors immediately after the abortive meeting: it is as follows:—

CHAMBERS, 13, DAME-STREET, DUBLIN,
21*st April*, 1891.

Re VAHY, CLAREMORRIS.

GENTLEMEN,—Owing to the inability, through illness, of the debtor to attend, I beg to inform you that the meeting held here to-day stands adjourned to and will be held on Monday, the 2nd day of May next, at the hour of 3 o'clock in the afternoon. In the meantime a valuation is to be made of the premises, and, by desire of the creditors, Messrs. Craig, Gardner & Co., who took stock, are to enter into possession of the estate.

I remain, etc.,

RICHARD DAVOREN.

It appears that on April 23, Mr. Gardner's assistant went down to Claremorris, and remained in possession of the debtor's goods till May 10, when he returned to Dublin. I read the circular as an intimation to the creditors that Mr. Gardner was taking possession for the creditors and against the debtor, to protect the goods against any act of the debtor's. Is this consistent with the order of April 6, supposing that to be a proper order? The debtor was not present himself, and some of the creditors passed this resolution. What legal right had they to pass it? I cannot find any. They seem to have arrived at the conclusion that it was necessary to protect the debtor from himself, not to protect his property from them. Mr. Gardner took possession, and his account is furnished very properly, as might be expected from him, showing what he did from April 23 to May 10. It appears that the assistant received considerable sums of money across the counter, made sales and payments, including a payment of £20 to Mr. Davoren for costs, and handed a balance of 17*s.* 1*d.* to the debtor as the result of that occupation. It was said by Serjeant Dodd that the assistant returned to Dublin because it was found that Vahy was not meeting his creditors fairly. Be that as it may, the adjourned meeting of creditors was held on May 2, the proposal of the trader then submitted was considered unsatisfactory, and the matter was turned into bankruptcy.

Mr. Gardner tells us his idea of his rights, and his version of what occurred. He states that the debtor was not present at the meeting of the creditors on April 21, that the debtor was unable and unfit to give any information: that there was an unanimous opinion among the creditors that he (Mr. Gardner) should send back to Claremorris to take stock, to have a valuation made, and to protect the assets pending the adjourned meeting. He also states that in this case he has followed the course which he has usually adopted, that he has done nothing that he has not been doing for the last twenty-five years.

There is another affidavit in which it is suggested that all that he or his assistant had done was done by the authority and with the consent of Vahy. Of course it is not for us to express any opinion whether it is desirable or not, in an abstract way, that creditors should have this unlimited power to deal with the assets of traders. The only questions for us to consider are:—1, Whether there was a valid order of the Court; 2, whether there was a violation of that order.

It is manifest that on April 21, when the creditors by their resolution directed Mr. Gardner to take possession the debtor was wholly ignored; and that Mr. Davoren was acting, and that Mr. Gardner took possession, for the creditors, and against the trader. It was strongly contended that the order of April 6 was *ultra vires*, and that the trader Vahy, and his solicitor, and Mr. Gardner, who had knowledge of, and disregarded it were free to treat it as inoperative. It would be a strong thing to hold that Vahy, who applied for this order, and Mr. Davoren the solicitor, who obtained it for him, could treat it as a nullity. I think the order was lawfully made. The form in which it is drawn has been in use for six years; and I cannot but think that section 68 of the Act of 1872 authorizes some such terms to be imposed. The question is not whether it is more desirable that the body of creditors should administer the trader's estate without the interference of the Court. In my opinion if the order was lawfully made, and Mr. Gardner knowing of it violated it, he would in the technical sense be guilty of contempt of Court.

I am not now saying how far moral blame attaches to anyone, but am only speaking of strict rights. If Mr. Gardner disobeys

Appeal. 1893. *In re* VAHY. Walker, C.

an order, knowing of it, and he afterwards contends, as he is entitled to do, that he is right in not regarding the order, he, of course, for the purposes of the argument, assumes the responsibilities of being guilty of contempt if his contention turns out not to be well founded. It is said with great force in *Russell* v. *East Anglia Railway Company* (1), that if an order is made the mode of testing it is not by disobeying it.

Mr. Gardner appears to me to be in this dilemma. Either he was acting for the trader, and as his agent disobeyed an order that bound the trader, in which case he would be guilty of contempt of Court; or else he was acting (as I believe the true state of affairs was) *bona fide* in the interest of the creditors, and against the trader, in which case if he chooses to act contrary to an order that he knows of, he accepts the responsibility of violating that order at his peril.

It is well settled that if an injunction is granted against A B, and his servants or agents break it, they are liable to attachment; but if any person knowing of the order of a Court violates it he is guilty, not of a breach of the injunction, but of contempt of Court: *Wellesley* v. *Mornington* (2).

In my opinion, therefore, the order of Judge Miller is right in declaring that Mr. Gardner committed a contempt of Court; but I think that the part of the order, subsequent to that declaration, should be varied by directing that Mr. Gardner should account for all moneys paid or received.

As regards costs, we think the assignees should have their costs in the matter, but we say nothing as to Mr. Gardner's costs.

FITZ GIBBON, L. J.:—

All are agreed that this case raises a difficult and important question of jurisdiction; its vital practical bearing on the business of the Court of Bankruptcy affords an extra reason for discussing it fully and calmly, and without strong language. I very much regret that some observations made in the judgment appealed from, upon the conduct of Mr. Gardner and Mr. Davoren, were thought to have gone beyond the limits within which a legal discussion might

(1) 3 M. & G. 117. (2) 11 Beav. 180.

have been confined. Possibly, we might not have had this appeal if the decision of the Court had been expressed in milder language, but we cannot discharge ourselves of the duty to ascertain what is the jurisdiction of the Court of Bankruptcy, whether it has been exceeded, and whether the system which Mr. Gardner claims to practise, can legally coexist with the due exercise of that jurisdiction. I pass from this more unpleasant part of the subject, with the remark that it is not enough for us merely to express our regret that observations affecting the character of the gentlemen named should have been made, if it be our opinion, as it is mine, that there was no foundation for those observations. I consider that there was no intention on the part of Mr. Gardner to "put his hand into the till of the debtor and transfer its contents into his own pocket"; I see nothing "audacious" in the conduct of either Mr. Gardner or Mr. Davoren: on the contrary, I am satisfied that both these gentlemen believed that they had the right to do what they did. The question for us is whether the course of dealing which they adopted is consistent with the orders of the Court, or brings them into collision with its legitimate authority.

No doubt the form and mode of exercising jurisdiction in cases of contempt are much affected by the consideration whether the Court exercising that jurisdiction is what is technically called "a Superior Court." But, in the present case, I cannot see that there is anything in that distinction, because, so long as the Court of Bankruptcy acts within its statutory powers, it has almost identical jurisdiction with any "Superior Court," to enforce, by process in the nature of attachment for contempt, any order which it may make. Almost the only practical distinction which would arise if we held the Court of Bankruptcy to be "an Inferior Court," would be the obligation to disclose its jurisdiction by facts stated upon the face of its Order, in a way that is not necessary in the case of a Superior Court. Upon that point I refer to what I said in *Keller's Case* (1). The Act of 1872, section 6, which prescribes the powers and jurisdiction of the Court of Bankruptcy, enacts that the Orders of the Court shall be of the same force as if they were

(1) 22 L. R. Ir. 158.

Appeal. 1893. *In re* VAHY. Fitz Gibbon, L. J.

judgments in the Superior Courts of Common Law or decrees in the High Court of Chancery. In order to give an Order of the Court of Bankruptcy, made within its jurisdiction, the same force as if, being in the same form, it were a decree of the High Court of Chancery, we must hold that such an order may be enforced by the same process of attachment.

The real question is one of jurisdiction, and arises on three sections of the Act of 1857. First comes section 343, which says:—"Any trader unable to meet his engagements with his creditors, and desirous of laying the state of his affairs before them, under the control of the Court, and of submitting himself to the jurisdiction of the Court as hereinafter mentioned, may present a petition to the Court setting forth the true cause of such inability, and praying that his person and property may be protected from process until further order." I am clearly of opinion that nothing whatever is added to the powers of the Court of Bankruptcy by reason of the petitioner having formally submitted to its jurisdiction. I read the statement in the petition that the petitioner submits to the jurisdiction of the Court as a submission to that jurisdiction without enlargement. No man submits himself to illegal action on the part of a Court by submitting to its lawful jurisdiction. Then the section says that the "person and property" are to be protected from process until further order, and that "the Court on such petition shall have power to grant such protection." That is the material part of the section. The substance of the relief is the effective protection of the property of the bankrupt from process. It cannot be protected, if it is left at the mercy of the creditors or of anybody else. The Court has jurisdiction to see that this protection is effective. It would appear necessarily to follow, and admittedly it does follow in the case of anyone claiming to act under process, that anyone violating the order may be restrained by attachment.

But it is argued that the Court cannot make the order which was made in this case, because there is an express power in a later section (sect. 344) which enables possession of the trader's goods to be taken by the official assignee or the messenger of the Court.

I read that section, not as containing all the powers of the Court of Bankruptcy, but as giving a specific power, on cause

shown, to send down an officer of its own to take possession of the property. I cannot see that the fact that the Court may send down its own officer, on just cause, to take possession of the property, can prevent the Court from taking steps to secure that the trader who obtains the order shall not himself misuse the protection in the meantime. It is not merely that the one course is milder than the other, but it is a course actually assumed to be essential to the protection of the goods. The course under sect. 344 is the exercise of a special power which could only be conferred by statute enabling the Court to take possession of property that does not vest. It appears to me that the fact that sect. 344 would have enabled the Court to make a totally different order does not show that the order which it made under sect. 343 was invalid.

The Act of 1872, section 68, is another very important section dealing with the same subject. Section 68 provides that the Court may at any time after the presentation of such petition appoint a receiver or manager of the property or business of the debtor or any part thereof, and may direct immediate possession to be taken of such property or business, or any part thereof. Does this not imply that when such a direction is not given the property and possession are to remain in the debtor, and that a receiver or manager need not be appointed unless the Court thinks that there is some reason for it? Can it be said that power to appoint a receiver or manager, in case of the debtor's misconduct, prevents the Court from making an order binding on the debtor himself, which will secure the object of the whole proceeding, namely, the protection of the property? The whole question is whether the Court has not power to impose terms on the debtor as to his dealings with the protected property, where it is not felt necessary either to take possession by an officer of the Court or to appoint a manager or receiver. I think that this jurisdiction is absolutely necessary for the ordinary transaction of the business of the Court, and that it would reduce the whole jurisdiction of the Court of Bankruptcy in arrangement matters to a sham, if we were to throw the slightest doubt on its having jurisdiction to make an order of this kind. Mr. Gardner's evidence appears to me to go to this—that there is a practice, or an attempt to establish

Appeal. 1893. *In re* VAHY. Fitz Gibbon, L.J.

a practice, by creditors, not by debtors, of taking possession of arranging trader's property, after orders for protection have been made, and of dealing with it by so-called resolution. If such a course is to be compared in illegality with a making away with the property by the debtor himself, such action on the part of the creditors can only be more illegal, because the protection is especially given as protection against process *by creditors:* and protection against "process" by creditors is at least equally inconsistent with their arbitrarily taking possession of the property for the purpose of administering it for their own benefit.

A private firm of accountants would, no doubt, do the business efficiently, but not under any known process of law; and the references to the English system of administering bankrupt estates through trustees only emphasize the absence of such a system from the Irish statutes. What is called "the parchment order" is only part of the order which was made on the petition: "the paper order" is the whole order. These are not two separate orders, but "the parchment order," which contains the very words of sect. 343, is only the first clause put upon parchment, apparently for the purpose of enabling the trader to meet parchment with parchment, if the sheriff comes with his *fi. fa.* Along with that order, and as part of the exercise of the jurisdiction of the Court, a number of provisions are made, equally within the statute, directing sittings and meetings of creditors, naming the official assignee, directing the rendering of accounts, the preparation of the lists of creditors and inventory of stock-in-trade, &c. Then comes the clause upon which the present case turns:—"And it is further ordered that the petitioner shall not make any payment or part with any portion of his property, except for the ordinary purposes of trade or business, without the sanction of the Court, and shall not give the possession of his property or any part thereof, except as aforesaid, to any person other than the official assignee of this Court, without the like sanction."

That does not appear to me at all to rest on any undertaking by the debtor: it is an exercise of the jurisdiction of the Court, and, even if it were not expressed by an order, it would seem to me to be an essential condition to granting protection from process that the man who gets that order should not part with the pro-

perty himself, in any other way than in the ordinary and necessary course of carrying on his business pending the arrangement. If he is to be protected in the possession, it appears to me to follow that he must not give that possession to someone else. To hold otherwise would be to facilitate fraudulent preferences, and dishonest appropriations or conversions of property, by the protection of the Court.

As between the Court and the trader, and as between the Court and the trader's solicitor, who obtained the order, the observations in *Russell's Case* (1) directly apply. The parties to the order cannot, after obtaining it, test its validity by disobeying it. Neither can anyone who could appeal against it set it at naught.

This is not Mr. Gardner's position. He is not a party to the order. But the Lord Chancellor has pointed out the dilemma in which he is placed. He was employed in the first instance by the debtor to take his stock, and to prepare a statement of his affairs. Afterwards, as appears from Mr. Davoren's circular, when the preliminary meeting broke down in consequence of the debtor's absence, Mr. Gardner entered into possession of the debtor's assets, *at the request of the creditors*. The circular shows that he had no authority from the debtor to go into possession, but that he did so by the authority of "the creditors"; which can only mean by the authority of those claiming to be creditors, who had appeared at the abortive meeting. I am willing to assume that he entered into possession with the knowledge of Vahy, and with his permission, so far as he was at the time capable of giving any permission, but that the possession was taken by the authority and in the interest of the creditors, is plain from Mr. Gardner's recalling his representative, retaining what he had received, deducting all his disbursements and expenses from the receipts, and remitting 17*s.* 1*d.* to the trader, because and when he failed to satisfy the creditors. All this was done *in invitum* as against Vahy, and as servant and agent of the creditors alone.

If the gentlemen assembled at the abortive meeting had gone down to Claremorris in person, and *agmine facto* had taken possession of Vahy's property, would they not have been acting in contempt

(1) 3 M. & G. 117.

Appeal. 1893. *In re* Vahy. Fitz Gibbon, L.J.

of the Bankruptcy Court? How, then, can they authorise an accountant to do what they could not do themselves? In this view, the action described in the circular letter was illegal, and inconsistent with the jurisdiction of the Court of Bankruptcy, and with its power to protect the property of an arranging debtor.

The question remains whether Mr. Gardner's action was a contempt of Court. Putting it in the view in which the fact strikes me, that Mr. Gardner was the agent of the creditors, I think it was, for his knowledge of the order, and his intention to carry out a system of liquidation inconsistent with it, are admitted. But putting it in the view that he acted as an agent for the debtor, it would be rather worse, because in that case Mr. Gardner would be the conscious agent of the party who had got the order. In any view, I think Mr. Gardner, at best, could only have the rights of a sort of *executor de son tort*. He could not pay away, or part with, anything which the trader was bound to keep. He could not pay himself or his solicitor; he could only carry on the business in the ordinary way, or under the sanction of the Court. Vahy's agent cannot without contempt violate the order which he knew Vahy to have obtained.

For these reasons I think Mr. Gardner has come into collision with the jurisdiction of the Court, and that therefore the first portion of the order under appeal must be affirmed. But there are contempts and contempts; and the just consequences vary as much as the contempts themselves. I believe this to have been merely what I may call "a test contempt," a *bonâ fide* attempt on the part of some creditors of an assigning debtor to see whether they could administer his affairs, outside the arrangement, and without consulting the Court, at their own will and pleasure. I do not believe that they can do anything of the kind, and I think that any decision except that at which we have arrived would be fatal to the jurisdiction of the Court in such matters.

The latter part of the order, however, must be varied by making it direct Mr. Gardner to proceed before the Registrar, and to account for his dealings with the property, in the same manner as the trader himself ought to have done. He must be allowed credit for such sums and for such assets as he may prove to have been parted with in the ordinary course of business,

getting no credit for the costs of his own and Mr. Davoren's unauthorized acts, and the balance must be brought in to the credit of the estate. I entirely concur in thinking that although the result is substantially the failure of Mr. Gardner's appeal, he had no alternative, having regard to the observations made by the Court below, except to bring the matter here to be discussed, and I therefore think that he should not be ordered to pay the assignee's costs of the appeal, but he must bear his own costs.

Barry, L.J.:—

On the principal point involved in this case I have the misfortune to differ from the Lord Chancellor and Lord Justice Fitz Gibbon. In common with them, I deeply regret the circumstances under which this case, which raises nothing but a dry question of law, has been brought before the Court. It is not for me to deal with any other aspect of the case than the legal aspect. At the same time, I think it only common justice to Mr. Gardner to say that I find in the facts of the case no shadow of foundation for the language and the manner adopted towards him in the Court of Bankruptcy.

The question whether the Court of Bankruptcy is (speaking technically of course) an "Inferior Court" or a "Superior Court" has been glanced at in the argument; but, as Lord Justice Fitz Gibbon has said, it is not material for us to decide in this case. In *Keller's Case* (1) this question was more fully discussed, but was left open by the judgment of the Court, and I wish to point out that the decision in this case leaves this Court perfectly free, if the matter ever comes before it, to decide the question either way. As at present advised, I see no reason whatever to qualify in any way the opinion that I expressed in *Keller's Case* (1), that the Court of Bankruptcy is what is technically called an "Inferior Court." If I am right in this view the brief observations which I am going to make will apply *a fortiori* to the order of that Court under consideration. But they are also applicable to the orders of any Court which may happen to be endowed by statute with special jurisdiction for a special purpose

(1) 22 L. R. Ir. 158.

Appeal. 1893. *In re* VAHY. Barry, L.J.

collateral with and independent of its ordinary, innate, or, as I may say, natural functions and powers. Such a Court, in my opinion—be it an "Inferior Court" or a "Superior Court"—is bound to exercise that statutory jurisdiction in strict conformity with the terms of the statute, and is not at liberty to meet a mischief that may seem to exist, or to provide for a contingency that may arise, by introducing even an excellent practice, the introduction of which is within the province of the Legislature only, and not within the province of a Court empowered merely to carry out the language and directions of the Legislature. In this particular case, where the jurisdiction of the Court of Bankruptcy comes in question, this observation is peculiarly applicable, because the law of Bankruptcy has been from the earliest times the creature of statute. So far as the question before us is concerned the jurisdiction of the Court depends on sect. 343 of the Act of 1857. This section enables the Court to exercise in its discretion—by that I mean judicial discretion—a power to be exercised in a proper case—a power to protect the person and property of the petitioning trader from process during the carrying out of the arrangement. But the section goes no further. It simply gives the Court the power to protect its petitioner from the process of other Courts.

We were asked during the argument—"Would it not be as bad for the good success of the arrangement if the creditors came in without process, took possession of the trader's property, and disposed of it, as if they came in with process in defiance of the order, and disposed of the property?" Perhaps so. All I say is that sect. 343 gives power to the Court of Bankruptcy, by its order, to protect against process only: it leaves persons who come in—creditors and others—and seize the property without process to be dealt with and proceeded against under the ordinary law.

Mr. Gardner may have acted illegally in what he did; if so the parties aggrieved have their remedy under the law. But I am not dealing with the illegality or legality of his conduct. The one question which I have to decide is, was his conduct such as to amount to a contempt of Court in respect of an order which sect. 343 empowered the Court of Bankruptcy to make. It may

be very desirable that the Court of Bankruptcy should have power to frame its order as it has done in this case. If I were asked my own opinion, as on a proposal for legislation, I would answer that I consider the form of this order a very good form. But I say that, as a matter of jurisdiction, the Court of Bankruptcy had no power to make it without the authority of the Legislature.

Under sect. 343, as I read it, when a trader presents his petition, praying for protection from process, the Court has power to do either one or other of two things: it may refuse the petition, or it may grant the petition and make an order in the terms of its prayer, protecting the trader's person and property from process. But it can do no more. Then it is said that that is a rather lame and impotent sort of proceeding—to make an order for protection if there is no means of protecting anything against anybody, except lawful creditors coming in with lawful process. But the legislation is not so defective as that. Because, in the first place, the Court has power given to it by sect. 344 to take possession by its own officer, and so, in case of need, to afford ample protection to the rights of the creditors against the petitioning trader; and, in the next place, the Court has power to appoint a receiver or manager, under sect. 68 of Bankruptcy Amendment Act, 1872, and so to protect the property against all the world. The fact that these powers are conferred upon the Court by these two sections has an important bearing on the question before us; because numberless cases can be found in the books to show that where a statute creates a liability or a right, and gives a specific direction as to how that liability is to be enforced, or that right vindicated, no other remedy is open but that so prescribed by the statute, unless under exceptional circumstances, which do not exist here.

Now, sect. 344 says:—"Forthwith after the granting of any order for protection, the Court shall appoint a private sitting to be held at such time as it may name and, *upon sufficient cause shown*, may, if it shall think fit, direct that the estate and effects of the petitioner shall be possessed and received by the Official Assignees, or be taken possession of by the messenger of the Court." This step is not to be taken upon the mere volition of the Judge, but in a

Appeal. 1893. *In re* VAHY. Barry, L.J.

manner limited by the statute, which he has no right to exceed. "Upon sufficient cause shown." That is, the Judge must investigate the matter, and if there is sufficient probability established that the protection of the Court is being abused, by being used to shield the bankrupt in misfeasance, the section provides as a remedy that a species of vesting order is to be made, and the messenger of the Court sent down to take possession of the property.

Here, without any cause shown, an order, purporting to be made under sect. 343, is drawn up in a form which it is pretended only involves the consequences of an order made under section 344, and is therefore valid. The form of order made in this case was settled, in my opinion, upon an ingenious but forced and erroneous application of *O'Callaghan's Case* (1). The only real question raised in that case was whether Mr. Gardner was entitled to be paid his costs and expenses according to a *quantum meruit*, or according to a scale in the schedule. This Court did not mean to decide, and did not decide, that any such tack as that appended to this protection order was legal.

Neither can it be argued that the order is validated by the provisions of sect. 68 of the Act of 1872, which enacts that a manager or receiver can be appointed over the property of the trader. No such step was taken here. One of the points suggested during the argument, and I rather think by one of my learned colleagues, was that the Judge could, under this section, have appointed Vahy himself a receiver or manager, and so have taken his property under the control of the Court. Well, perhaps he could have done so; but he did not. On the contrary, he has done a thing for which warrant cannot be found within the four corners of either Act of Parliament. It was suggested that when the Court is given power to make an order for the protection of a petitioner's goods, by implication it is endowed with all powers necessary to enforce that order. But this principle has never been applied in the history of our law to a statutory jurisdiction. It has also been said that this order is not so severe an order as to send down the messenger to take possession, and that the jurisdiction to make it is therefore included in the jurisdiction enabling the Court to send the messenger down. That the greater includes

(1) 19 L. R. Ir. 32.

the less is no doubt a maxim of logic: but such logical maxim has no application in a case of a specific statutory jurisdiction. Though it be a milder mode of procedure than the statutory one, yet it is not an order authorized by the statute. I do not understand this important tribunal, with limited statutory powers, when its order is impugned as not being the order it ought to have made, defending itself by saying: "Well, if I did not do the thing I ought to have done, I went very near it." It is impossible to apply a *cy près* doctrine to jurisdiction. Therefore I cannot recognise the order made here as valid.

Then, it is said that admitting that *qua* order it is invalid, yet it is good as an undertaking, because, as the order was made on the application of Vahy, the terms imposed by the tack at least amount to an undertaking by him not to part with his goods. It is ludicrous to say that there was in fact an undertaking, because the order was in the cut-and-dry form settled by the Court, and neither its consequences nor its results were ever brought before the mind of the trader taking out the order. But I will assume it now to be an undertaking by Vahy that he would not interfere with the property in the manner specified, and I will admit also that an undertaking so given would have been binding on Vahy, and further, that it would have had the effect, at all events, of an injunction. But I want authority for this proposition—where there is an undertaking, enforceable against the party making it by attachment, sequestration, or in any way known to the law, that any other person not party to the undertaking, nor servant or agent to such party, is liable to process of contempt if he were to act—take it—erroneously, in point of law, and do something from which the party giving the undertaking was thereby prohibited from doing. There can be produced no case of attachment for breach of an undertaking save against the person who gave the undertaking. Is it to be said Gardner was the agent of Vahy? On this point there was a curious inconsistency in the way the case was presented. One minute he was charged with contempt as the agent of Vahy, and the next minute the very head and front of his offence was said to be that he was acting for the creditors and against Vahy. And if he were acting for the creditors and against the debtor—and in my view that is

Appeal. 1893. *In re* VAHY. Barry, L.J.

the true view of his position upon the evidence—by what process of reasoning he can be declared guilty of contempt for breach of an undertaking given by a man against whom he was acting I do not know. There is no doubt that if an injunction is given against a man, and someone else comes in his interest and deliberately violates the order made in the case, the man may be attached for contempt of Court, or for breach of the injunction. But look at the facts of this case. Here the creditors were called together to effect an arrangement for this poor drunken trader, who was unable to look after his own affairs. They held a meeting that was irregular, because the debtor was not present. Mr. Gardner's conduct was perfectly *bona fide*—all the members of the Court are agreed in that. He comes in wholly independently, acting independently as a professional accountant; he is employed by the creditors irregularly, illegally, if you like, in a manner that cannot be sanctioned in a Court of law. But no order is made against him: no order was made against the creditors except protecting the debtor's goods from their process; and unless there be some inherent quality in a Court, enabling it to amplify its jurisdiction and invent methods of carrying into effect statutory powers which have been given to it, and which are only enforceable under the provisions of the statute which confers them, I cannot see where the contempt comes in.

I have already referred to the unpleasant part of the case. It appears that the way the case was dealt with in the Court below resulted in an order so excessive that hardly a word was to be said in support of it. Mr. Gardner was ordered to bring into Court all the money he had got in. He was to get credit for no expenditure, not even the premium that he had paid on the assurance. I believe that if the case had been dealt with in a different spirit in the Court below it never would have been brought here.

It seems to me that we need not be anxious for the jurisdiction of the Court of Bankruptcy. This system of protection can be carried out by the simple application of the sections I have referred to—1, against process by creditors—a protection order may be given on the petition of the trader; 2, against the interference of the debtor himself—upon sufficient cause shown a vesting order can be made, and the property taken in charge by

the messenger of the Court; 3, against the interference or default of the outside world—a receiver or manager may be appointed to collect and manage the assets. If it is found a more convenient course to make such an order as has been made in this case, let application be made to the Legislature for such power; but under the existing legislation, in my opinion, the Court of Bankruptcy had no jurisdiction under the statute to make the order in the form in which it is drawn. For the reasons I have stated, I am of opinion that Mr. Gardner, being an independent person, bound by no order, bound by no undertaking, cannot be held guilty of contempt, and that the order declaring him guilty should be discharged.

If the order be affirmed, I agree in thinking that it must be modified as decided by the other members of the Court.

Solicitors for the appellant: *Scallan.*

Solicitors for the respondent: *Casey & Clay.*

G. Y. D.

KING-HARMAN *v.* CAYLEY (1).

Appeal. 1894. Jan. 18, 19, 22.

Will—Construction—Tenant for life, with power to appoint—Charge on estates—Trustees to pay charges and incumbrances out of accumulation of rents—Action for administration—Petition for sale in Land Judge's Court.

H., who was owner of the R. and B. estates for life, with a power of appointment, subject to a charge of £10,000 on those estates created by a settlement of the 20th January, 1885, and secured by a term of 1000 years, made his will, dated the 30th November, 1886, by which he devised the estates to his daughter for life, with remainder in tail male, and with divers remainders over. The will contained a forfeiture clause, in the event of his daughter marrying in the lifetime of her mother without her consent in writing, in which event (which afterwards happened) he directed that his daughter should thenceforth hold the estates upon trust for the testator's wife during the joint lives of her and his daughter; and in the event (which happened) of his wife dying in the lifetime of the daughter, in trust to pay to or permit the rents to be received by the trustees of the will until a child of his daughter should attain twenty-one, if such event should happen in her life; and he directed

(1) Before WALKER, C., PALLES, C.B., and FITZGIBBON, L.JJ.

Appeal. 1894. KING-HARMAN v. CAYLEY.

that the rents should be invested and accumulated, and that upon the death of his daughter, or as soon as a child should attain twenty-one, whichever should first happen, the trustees should apply the accumulated fund in payment of the charges affecting the estates, without regard to priority. The testator then bequeathed the charge of £10,000 to his wife absolutely, expressing a wish that she should release her life estate in the charge.

The testator died on the 10th June, 1888. The daughter married in May, 1890, without the consent of her mother, whereupon Mrs. H. entered into possession of the estates. Mrs. H. died in May, 1893, having, by a codicil to her will, directed that the surplus of her personal estate, after payment of certain legacies, should be devoted to pay off or reduce the incumbrances on the R. estate.

There was one child issue of the marriage of the testator's daughter, and an action was brought on the 30th May, 1893, to administer the real and personal estate of H. On the 8th June, 1893, the statement of claim was delivered. On the 23rd June the executors of H. filed their defence, and on the 1st July the executors of Mrs. H. filed their defence. On the 4th July, 1893, the executors of Mrs. H. presented a petition for the sale of the R. and B. estates to the Land Judge's Court.

On the 20th July the Master of the Rolls made a decree for administration, directing the ordinary accounts, and inserted a declaration that the persons claiming under the will of the testator as specific legatees of incumbrances affecting the R. and B. estates, were bound to accept payment of such incumbrances under the trusts of the will for the discharge thereof, by receipt and accumulation of rents or otherwise, as the Court might direct:—

Held (varying the decree of Porter, M.R.), that this declaration should be omitted, as the Court had no jurisdiction to restrain proceedings in the Court of the Land Judge; but leave was given to the minor to use the name of the trustees in showing cause against making absolute the order for sale.

By a settlement dated 20th January, 1885, the Rockingham and Ballinamuck estates were settled upon trust for Colonel Edward Robert King-Harman for life, with remainder to his son Laurence King-Harman, for life, with remainder in tail male, with remainder to Laurence King-Harman, in fee, and by the same indenture the Rockingham estate was limited to trustees for 1000 years, from the day of Colonel King-Harman's death, upon trust to raise the sum of £10,000, and invest the same, and pay the interest of such investments to Emma King-Harman, the wife of Colonel King-Harman, for life, and after her death, as to the capital and income of the £10,000 for such of the children as Mrs. King-Harman should appoint, and in default of appointment

for Laurence King-Harman. The said Laurence King-Harman died on the 22nd October, 1886, unmarried, having by his will devised his remainder in fee in the Rockingham and Ballinamuck estates to his uncle George Douglas King-Harman, upon trust as Colonel King-Harman should appoint, but he did not dispose of his contingent interest in the charge of £10,000, and consequently Laurence King-Harman's interest in the charge then became vested in Colonel King-Harman as his sole next-of-kin.

Colonel King-Harman made his will, dated the 30th Nov., 1886, and having recited in it the indenture of the 20th January, 1885, and that he had a power thereby to charge the Rockingham estate with a payment to his wife of a rentcharge of £1000, the testator, in exercise of the power granted to him by Laurence King-Harman, appointed the remainder in fee in the Rockingham and Ballinamuck estates to the sole and separate use of his daughter Frances Agnes King-Harman, with remainder to her first and every other son in tail male, and in default of such issue to the use of her first and other sons in tail general, with remainder to her daughters in tail male, with remainder to her daughters in tail general, with remainder to the testator's brother, Montague Jocelyn King-Harman for life, with remainder in tail male, with divers remainders over. The will contained a name and arms clause, and also a clause declaring that in case Miss King-Harman should marry without consent of her mother, then Miss King-Harman should hold the Rockingham and Ballinamuck estates in trust for her mother during their joint lives, and in case Mrs. King-Harman should die in the lifetime of Frances Agnes King-Harman, then, after the death of Mrs. King-Harman, in case no child of the said Frances Agnes King-Harman should have attained twenty-one, in trust, to permit the rents of the estates to be received by the trustees of the will, until a child of Frances Agnes King-Harman should attain the age of twenty-one years, if such event should happen in the lifetime of Frances Agnes King-Harman; or, if such event should not happen in her lifetime, then during the remainder of the life of Frances Agnes King-Harman; and if any child of Frances Agnes King Harman should attain twenty-one, then in trust for the person who would be entitled to the rents if Frances Agnes King-Harman were dead. The testator

Appeal. 1894. KING-HARMAN *v.* CAYLEY.

declared that any rents which should be paid to or received by the trustees of the will should be invested upon securities, so that the same and the resulting income might accumulate at compound interest. The testator directed the trustees, upon the death of his daughter, or so soon as a child of hers should attain twenty-one, or at any previous time, or from time to time, to apply the accumulated fund, or such part thereof as might be available for the purpose, in payment or reduction of the charges and incumbrances affecting the Rockingham and Ballinamuck estates, or any of them, without regard to the priority of such charges and incumbrances, and in case there should be any surplus of such accumulated fund after payment of all charges and incumbrances affecting the said estates, the testator directed that such surplus should be laid out and invested by the said trustees in the purchase of lands in England or Ireland, held in fee, to be conveyed and assured to the said trustees in fee-simple to the uses, upon the trusts, and for the purposes, limited in the will concerning the Ballinamuck estate. And as to the charge of £10,000, created by the indenture of the 20th January, 1885, the testator bequeathed the same to his wife absolutely, and he requested his wife, in consideration of the benefits conferred upon her by his will, to execute, before three months from the date of the decease of the survivor of the testator and his mother, a deed releasing her life interest in the said sum of £10,000, and her power of appointing the capital thereof; and he charged the Rockingham estate with an annual rentcharge of £800 for his wife, and appointed George Douglas King-Harman and Sir G. Cayley executors.

The testator died on the 10th June, 1888, and his daughter Frances Agnes King-Harman entered into possession of the Rockingham and Ballinamuck estates. On the 21st May, 1890, Miss King-Harman married Thomas J. Stafford without the consent of her mother, and there was one son issue of the marriage. From the date of the marriage, Mrs. King-Harman entered into possession of the rents and profits of the estate, and continued in possession till her death on the 16th May, 1893.

Mrs. King-Harman made her will on the 30th September, 1889, with one codicil, dated the 17th June, 1890, and after bequeathing a number of pecuniary legacies, she directed that any

residue of her personal estate should be devoted to paying off and reducing the incumbrances on, or otherwise for the benefit of, the Rockingham estate, and she appointed J. W. Pennyman and George Everard Cayley her executors.

On the 30th May, 1893, this action was commenced to administer the assets of Colonel E. R. King-Harman by the minor, child of T. J. and Mrs. Stafford, and the statement of claim was delivered on the 8th June, 1893; the defence of the executors was delivered on the 23rd June, 1893, and that of the executors of Mrs. King-Harman on the 1st July, 1893. On the 16th June an order was made appointing a Receiver. On the 4th July, James W. Pennyman and George E. Cayley, the executors of Mrs. King-Harman, presented a petition for sale in the Landed Estates Court, to sell the Rockingham and Ballinamuck estates, on foot of the £10,000 charge. The rental of the said estates, after payment of head-rents and other outgoings, was about £18,000 a-year; it was subject to charges of about £228,000, and on the estate was a very handsome mansion-house, and a demesne of over 2000 acres. It was stated that the trustees of the will of Colonel King-Harman approved of the presentation of the petition, but the principal mortgagees, including the Representative Body of the Irish Church, objected to the sale.

On the 20th July the Master of the Rolls made a decree for the administration of the real and personal estate of Colonel E. R. King-Harman, and after directing the usual accounts, he added the following clause to the decree:—"The Court doth declare that persons claiming under the will of the testator as specific legatees of incumbrances affecting the Rockingham and Ballinamuck estates, are bound to accept payment of such incumbrances under the trusts of the said will for the discharge thereof by receipt and accumulation of rents, or otherwise, as the Court may direct."

From that clause in the decree the executors of Mrs. King-Harman appealed.

The Right Hon. John Atkinson, Q. C., Price, Q. C., and *W. Moore*, for the appellants:—

The decree deprives the specific legatee of a charge on lands of the right to raise the legacy by sale. This right could only be

Appeal. 1894. KING-HARMAN v. CAYLEY.

taken away by express declaration or *necessary* inference from the will. That is not the case here: *French* v. *Davies* (1); *Birmingham* v. *Kirwan* (2). Furthermore, since the Judicature Act, sect. 27, sub-sect. 5, no Court has jurisdiction to restrain a litigant from prosecuting his suit before another branch of the High Court. The proper course for the plaintiff to have adopted, if he had grounds for doing so, would have been to apply to the Land Judge to stay proceedings in the petition matter. The Land Judge will sell, notwithstanding an administration decree: *Chambre's Estate* (3); *D'Arcy Irvine's Estate* (4). If the decree is right, then, if mortgagees (who cannot be restrained by anything in the will) sell the estate during the period of accumulation, this charge of £10,000 may never be satisfied, for the testator, though aware of the existence of incumbrances, has not provided for its payment out of the proceeds of a forced sale: *Tewart* v. *Lawson* (5); *Norton* v. *Johnston* (6); *Baldock* v. *Green* (7).

The discretion of the trustees is not extinguished by a decree for administration; it is controlled merely, and can be exercised still, under the supervision of the Court: *Gray* v. *Gray* (8); *Hagan* v. *Duff* (9); *Bethell* v. *Abraham* (10).

Serjeant Jellett, Q.C., Matheson, Q.C., and *J. H. Moore,* for the respondent:—

It was the intention of the testator by his will to keep the estate in his family, and it was also his intention to increase the bulk of the estate. This is obvious from several of the clauses in the will—the name and arms clause; the provision in the will for increasing the bulk of the estate by the purchase of other lands; and, lastly, the accumulation clause for the payment of incumbrances without regard to priority. That last clause meant that if any incumbrancer was pressing for payment his claim might be disposed of. We submit that upon the true construction of the will the accumulation of the rents was first to be resorted to for

(1) 2 Ves. Jun. 577.
(2) 2 Sch. & Lef. 444.
(3) 21 L. R. Ir. 23.
(4) 31 L. R. Ir. 168.
(5) L. R. 18 Eq. 490.
(6) 30 Ch. Div. 649.
(7) 40 Ch. Div. 610.
(8) 13 Ir. Ch. Rep. 404.
(9) 23 L. R. Ir. 516.
(10) L. R. 17 Eq. 24.

payment of the charges and incumbrances, including the charge of £10,000: *Wilson* v. *Halliley* (1); *Heneage* v. *Lord Andover* (2); *Warter* v. *Hutchinson* (3); *Young* v. *Hodges* (4). There are sufficient personal assets of Mrs. King-Harman to pay any debts of hers, which are small; and none of the legatees under her will can claim to be paid until one year after her death, that is, on the 16th of May, 1894. By that time at least one half-year's rent of the estate will have come in, which will be available to discharge *pro tanto* this charge of £10,000. None of the other mortgagees desire a sale, and this is evidently an attempt to sell a very large estate on account of one charge, while the testator desired the estate to be kept in the family.

Herbert Shaw, for Montague Jocelyn King-Harman, and Edward King-Harman, his son, who were entitled to the estate in remainder on the death of the minor, objected to the estate being sold. He also appeared for Colonel Wentworth King-Harman, who was a mortgagee on the charge of £10,000.

WALKER, C.:—

Jan. 22.

In this case of *King-Harman* v. *Cayley*, The Master of the Rolls, in his judgment, after directing the usual accounts, inserted a declaration which it is one of the objects desired by the appellants to remove. That declaration is as follows:—His Lordship doth declare "that persons claiming under the will of the testator as specific legatees of incumbrances affecting the Rockingham and Ballinamuck estates are bound to accept payment of such incumbrances under the trusts of the said will for the discharge thereof by receipt and accumulation of rents or otherwise as the Court may direct." We intimated early in the argument that we were not disposed to agree with the Master of the Rolls as to the insertion of that declaration; but as we are differing from a very eminent Judge, I am desirous of stating my own reasons for my opinion.

It appears that by the re-settlement of the estates of the 20th January, 1885, a term of 1000 years was created to take effect

(1) 1 R. & M. 360.
(2) 3 Y. & J. 360.
(3) 1 Sim. & St. 276.
(4) 10 Ha. 158.

Appeal. 1894.

KING-HARMAN v. CAYLEY.

Walker, C.

from the death of Colonel King-Harman, upon trust to raise a sum of £10,000, and to pay the interest to Mrs. King-Harman for life, and in case of no appointment, upon trust for Laurence King-Harman. Thus Laurence King-Harman had a vested interest in the fund, subject to be divested by the exercise of the power. Laurence King-Harman died on the 22nd October, 1886, without disposing of his contingent interest in the fund, and Colonel King-Harman under the terms of his son's will, became entitled to the contingent interest. Colonel King-Harman was tenant for life of the estates on which the £10,000 was charged, and in the event that happened he had also a general power of appointment over the estate. The £10,000 was not merged by any act of his; it would have required an act of his to merge it; and he made his will on the 13th November, 1886, which contained an appointment of the estates subject to the charge, and a gift of the charge which plainly overrode the state. He appointed the estates under an exercise of the power which he had in the following words:—"That the estates shall, subject and without prejudice to the charges, incumbrances, jointures, terms of years, and powers affecting the same, mentioned in the said indenture of settlement, or created or arising under, or by virtue of, the same indenture, go, remain, and be to the sole and separate use of my said daughter, Frances Agnes King-Harman." Therefore the appointment of the estate is expressly subject to that term of 1000 years, and any appointee took subject to the term and the charge; and the estates were devised to his daughter Frances Agnes for life, with remainder to her first and every other son in tail male, with remainder to her first and every other daughter in tail male, with remainder to her first and every other daughter in tail general, with remainder to the testator's brother Montague Jocelyn King-Harman for life, with remainder to his first and other sons in tail male, with divers remainders over. Then followed a name and arms clause, and a clause defeating the daughter's estate, in case she married without the consent of Mrs. King-Harman, and he carries out that intention by making her a trustee in these words:—"Provided further, and I hereby declare that, in case my daughter Frances Agnes King-Harman shall marry in the lifetime of her mother, the said Emma Frances King-Harman, and that such marriage shall take

place without the consent in writing of the said Emma Frances King-Harman, then my will is that from and after the solemnization of my daughter's marriage without such consent as aforesaid, my said daughter shall thenceforth during the remainder of her life, but without prejudice to the uses, estates, or powers preceding or overriding the life estate hereinbefore limited to her, and to the uses and estates limited in exercise of such powers, hold the said Rockingham and Ballinamuck estates and the rents and profits thereof upon the trusts hereinafter declared, that is to say, in trust, for the said Emma Frances King-Harman" during the joint lives of her and her daughter; and if Mrs. King-Harman should die in the lifetime of her daughter, then in trust to accumulate the rents during the minority of any child his daughter might have. Thus it appears that if this estate went over from a marriage without consent, it went over subject to the term and the charge thereby secured. It may be a question whether the legal estate went to the trustees, but it is not material for the question before us. Having thus fastened a trust on the estate, subject to the £10,000 charge, he provided a sinking fund for the payment of the charges and incumbrances. He provided that the rents and profits to be paid to the trustees should be invested and accumulated at compound interest in the following terms:—"And that my trustees or trustee shall at the death of my daughter, or so soon as a child of hers shall attain the age of twenty-one years, whichever shall first happen, or at any previous time, or from time to time, apply the accumulated fund or such part or parts thereof as may be available for the purpose, in payment or reduction of the charges and incumbrances affecting the Rockingham and Ballinamuck estates, or any of them, without regard to the priority of such charges and incumbrances."

It is clear that the fund is intended to be applied for payment of everything under the description of charges and incumbrances, including both the mortgage vested in the Representative Church Body, who are the first mortgagees, and the £10,000 charge. In the latter part of the will he gives the £10,000, in the events which have happened, to his wife absolutely, with a direction to her to release her life estate, and the power of appointing the charge. It was his own property: he might do with it as he liked. He

Appeal. 1894. KING-HARMAN v. CAYLEY. Walker, C.

might have said:—"You must resort to the sinking fund for payment of this charge"; but he did not.

The testator died on the 10th June, 1888, and Miss King-Harman married on the 31st May, 1890, without the consent of her mother, when the clause giving over the estate took effect. Mrs. King-Harman died on the 16th May, 1893. She made a will on the 30th September, 1889, with one codicil, dated the 17th June, 1890; and her executors are the defendants Pennyman and Cayley. By her will she gave a number of legacies, amounting roughly to £6560; but no legacy was payable till the 19th May, 1894; and further, it appears that every penny not required for debts and legacies must, under the trusts of her will and codicil, go back to the Rockingham estate.

On the 30th May, 1893, the present action was brought, a Receiver was appointed on the 16th June, 1893, and on the 1st July, 1893, the executors of Mrs. King-Harman filed their defence. In it they say:—"These defendants have not up to the present ascertained all claims against the estate of the said Emma Frances King-Harman, or administered the said estate, and it is impossible under these circumstances for the said defendants to state how much of the residue of the articles of furniture and other effects bequeathed by the said Emma Frances King-Harman may eventually, if ever, become heir-looms in connection with the Rockingham estates." Therefore, at the moment that this petition was in the course of preparation, the executors were unable to say that they had ascertained all the claims on the estate of Mrs. King-Harman.

The judgment of the Master of the Rolls contains the declaration I have read, and the executors, by this appeal, challenge the right to its insertion. I agree that Colonel King-Harman never dreamt that the £10,000 which he left to his wife should be the means of selling the estate, and he might, in bequeathing this charge, of which he was absolute master, have prevented his wife from raising it otherwise than by resorting to the accumulation clause. But this restriction of right must be found in the will as a matter of construction. There is no case of election.

In my opinion this declaration should not be inserted in the judgment, and the appellants have a right to come here to insist

on its removal. Its presence in the judgment would bind them to all time.

The extraordinary proceeding of the Landed Estates Court petition of the 4th July remains. I agree that there was an assent by the executors to the legacy of £10,000 to Mrs. King-Harman.

She died on the 16th May, 1893. Conflicting statements have been made as to her assets, and the claims upon them, and in the verified schedule of assets, the receiver's accounts, and the accounts verified, marked B, we find various conflicting statements as to the assets. The legacies, to the amount of £6500, are brought in as a charge on the estate. We have then the defence delivered contemporaneously with the petition, the statement from which I have read. It is regrettable that there was such extreme haste in the filing of this petition. It does not appear that notice was served on anybody; and if this petition was filed with the assent of the trustees of the will of Colonel King-Harman, their action is extraordinary, because they are trustees of a sinking fund manifestly designed to protect the estate from sale. It was their duty to protect the estate for the minor.

It is clear, I think, that the power of staying any proceedings on that petition does not rest with this Court, and inasmuch as that jurisdiction exclusively belongs to Mr. Justice Monroe, I shall not make any observations which might be construed as designed to influence his action. We shall amend the decree by striking out the declaration challenged, and we shall add to our order the following clause:—"And it appearing to the Court that any excess of the charge of £10,000 bequeathed by the testator Colonel Edward King-Harman to his wife Emma King-Harman over and above such sum as, with her other assets, applicable thereto, will suffice for payment of her debts, legacies, and funeral and testamentary expenses, after payment of the portion of the said charge belonging to Colonel Wentworth King-Harman, is held by the appellants in trust to apply the same, in paying off or reducing incumbrances, or otherwise for the benefit of the Rockingham estate of the testator Colonel Edward R. King-Harman, and therefore ought not

Appeal. 1894. KING-HARMAN v. CAYLEY. Walker, C.

to be raised by the sale of the said estate; and it further appearing that the amount, if any, of the said charges which ought to be raised cannot be ascertained without an administration of the assets of Mrs. King-Harman, and further, that a large amount has been received, or is receivable, out of the rents and profits of the landed estates of the said Colonel King-Harman, which has been applied, or is applicable to pay the debts, legacies, funeral, and testamentary expenses of the said Mrs. King-Harman, and that a further amount is likely to be receivable out of the said rents and profits, and to be immediately available for payment or reduction of the charges and incumbrances affecting the said estates, and Colonel Wentworth King-Harman, by his counsel and solicitors, stating that he does not desire that any proceedings should be now taken or continued to call in or raise any portion of the principal of the charge due to him, and that he is willing to take an assignment of an equal amount of the said charge, and to leave the same for the present outstanding; and it further appearing that the appellants, on the 4th July, 1893, obtained a conditional order for sale of the said estates in the Court of the said Land Judge, and that the said petition was presented with the approbation of the trustees of the will of Colonel King-Harman, and that the said trustees have not shown cause against the said conditional order for sale, let the plaintiff by his next friend have an opportunity of taking such proceedings as he may be advised, before the Land Judge, in the names of the said trustees, or of Frances Stafford, to show cause against the said conditional order, or to stay proceedings, or to dismiss the said petition for sale, and let either party also have an opportunity of applying to the Master of the Rolls for leave and direction to proceed, either in this suit or in a separate action, to ascertain the amount, if any, of said charges, which is raisable, or which ought to be raised, out of the landed estates of the said Colonel King-Harman, and for that purpose to administer the assets of the said Emma King-Harman, or to take such accounts as may be necessary, the appellants to have their costs of appeal against the plaintiff, the plaintiff to have same over with his own costs as part of his costs in this action, the defendants Montague and Edward King-Harman to have their costs of appearing by counsel on this appeal as part of their costs in this action."

PALLES, C. B.:—

The principal question upon this appeal is whether the persons beneficially entitled to so much, as is now raiseable, of a sum of £10,000 (secured by a trust term created by a settlement of 20th January, 1885), are, under the trusts of the will of the late Colonel King-Harman, bound to look for payment thereof solely to the rents of certain estates, or are they entitled to raise the same by sale of the Rockingham estate? The trusts of the term were, as soon as conveniently might be after the decease of Colonel King-Harman, by demise, sale, or mortgage of the lands comprised in the term, or by perception and retention of the rents and profits, to raise the sum of £10,000, and to pay the interest of the securities on which the same might be invested to his wife for her life, and after her death upon certain trusts under which the beneficial interest in the charge afterwards became vested in Colonel King-Harman himself, subject to the life interest of his wife. As this lady has elected to take under the will, this life interest may be left out of consideration. At the time of Colonel King-Harman's will the estate stood limited subject to this, amongst other charges, to himself for life, with remainder to such uses as he should appoint. His will of 30th November, 1886, recites the settlement, and that, by it, the Rockingham estate was limited to trustees for 1000 years from his death, upon trust to raise the sum of £10,000, and recites his title to the charge, subject to the life estate of his wife in the dividends thereof, and by it the testator proceeds to appoint the remainder in fee in (*inter alia*) the Rockingham estates (subject and without prejudice to the charges, incumbrances, terms of years and powers affecting the same, mentioned in the settlement, or created or arising under and by virtue of the same), to certain uses which in the events which have happened are, to his daughter, now Mrs. Stafford, for life, with remainder to her first and other sons in tail, with a forfeiture clause, in the event, which has happened, of her marrying in the lifetime of her mother without her consent in writing, in which event the testator directed that his daughter should thenceforth, without prejudice to the prior uses, estates, or powers preceding or overriding the life estate limited to her, hold the same upon trust for the testator's wife during the joint lives of her and his daughter

Appeal. 1894. KING-HARMAN v. CAYLEY. Palles, C.B.

and in the event (which has happened) of his wife dying in the lifetime of the daughter, in trust to pay the rents to, or to permit them to be received by, the trustees of the will, until a child of Mrs. Stafford should attain the age of twenty-one, if such event should happen in her lifetime; and he directed that the interim rents should be invested and accumulated, and that upon the death of his daughter, or as soon as a child should attain twenty-one, whichever should first happen, or at any previous time, or from time to time, the trustees should apply the accumulated fund in payment or reduction of the charges and incumbrances affecting the estates, without regard to the priority thereof, and in case there should be a surplus of the accumulated fund, the testator directed that it should be invested in the purchase of land.

The subject-matter of this trust is the estate subject to the charge and to the term which secures it.

The will then proceeds to dispose of the charge of £10,000, which it described as "the said charge of £10,000, so as aforesaid created by the said indenture of settlement of the 20th Jan., 1885," and this charge the testator bequeathed (in the events which have happened) to his wife absolutely, expressing his wish that she should release her life interest in it, which she accordingly did. It is admitted by counsel for the respondents that the testator's widow might have raised this charge by sale at any time before her daughter's marriage, or at any time after that marriage, had it been with consent, or at any time after the marriage, although without consent, during her, the widow's, own life. But it is argued that, upon the true construction of the will, it was the intention of the testator, that so soon as the trust for accumulation arose, and during its continuance, the annual rents and their accumulations should *alone* be resorted to for payment of the charge. I am unable to gather any such intention from the will. The testator had two separate and distinct properties, which by his will he took care should continue to be separate and distinct, and he disposes of each of them separately. One is the charge of £10,000, the owner of which, unless his rights were cut down or restrained by the will, was entitled to the benefit of the term of 1000 years, and all the remedies thereby provided, including the

power of sale. This charge, described as "so as aforesaid created by the said indenture of settlement of the 20th day of January, 1885," is bequeathed specifically, and in the bequest of it there is no indication of a restriction of the rights which by the settlement were annexed to it. The charge is given, and with that charge *prima facie* passes every right incident to it. Nor is there, in any other part of the will, anything inconsistent with this. No doubt the testator also disposes of the estates which are subject to the charge, but this disposition is equally clear, and in nowise inconsistent with the bequest of the charge. The subject-matter of it is the estates "subject to the charges, incumbrances, . . . terms of years . . . mentioned in the said indenture of settlement." This, and this only, is the subject of the trust for accumulation. There being then no inconsistency of disposition, and the words of the bequest, unless restrained by the other parts of the will, involving an intention that the charge may be raised in any of the modes authorized by the settlement, it is necessary, in order to impose an obligation on the legatees not to resort to one of these modes, to find from the other parts of the will an affirmative intention that the legatee shall not be at liberty to do so. The accumulation trust is the only part of the will relied upon as indicating this intention.

Now, there are two things which are quite distinct—(1) there is the right of the creditor under his contract or trust to call in his charge. The exercise or non-exercise of this right depends entirely on his own volition. He cannot call it in until it is payable; but although payable, he is at liberty to refrain from raising it. In this sense the charge is looked at from the point of view of the creditor. But (2) there is the right of the debtor, in this instance the estate or its owner. He cannot pay off the creditor until the charge has become payable, but when it is payable he may pay it off even against the will of the creditor. In this sense the charge is regarded from the point of view of the debtor. There is no inconsistency in regarding the one charge from these two separate points of view, and in practice we know that frequently charges are, and continue for years, to be in such a position, that they may be either called in by the creditor or paid off by the debtor at short notice at the volition of either.

Appeal. 1894. KING-HARMAN v. CAYLEY. Pallas, C.B.

Now the testator, in respect of this particular charge, occupied at the time of his will a twofold position—1, He was its owner, and as such he intended to dispose of it; 2, he had the dominion of the estate out of which it, in common with other charges, was payable. In my opinion, in the disposition of the charge, he speaks as its owner and intends to confer upon his legatee the same rights and remedies in reference to it as he himself had. On the other hand, in the trust for accumulation, which is part of the devise of the estates, his words are those of the owner of the estate. In this trust he refers not to this particular incumbrance, but to all incumbrances. His object is not to interfere with the rights of the incumbrancers or of any particular incumbrancer, but to authorize his trustees (when the circumstances of the estate may permit) to exercise the rights of the owner of the estate to pay off such of these incumbrancers as they may think fit, and as are either willing, or bound, to accept payment. To my mind this trust does not afford any indication of intention to restrain the powers of raising the £10,000.

The cases cited do not apply. In all of them the charge was one created *de novo*. In two of them, viz. *Wilson* v. *Halliley* (1), and *Heneage* v. *Lord Andover* (2), there was no express direction to raise by sale, and the question was whether "rents and profits" in a certain context meant annual rents and profits. Such a question is wholly different from that before us. In the third, *Warter* v. *Hutchinson* (3), the first devise was to the testator's trustees, till his nephew should attain twenty-one, upon trust to raise out of rents and profits, or by sale or mortgage, certain sums; and the decision was that the fund which had arisen from the rents during the minority of the nephew was applicable to the sums so directed to be raised, and that the difference only could be raised by sale or mortgage. For these reasons I think that the declaration appealed against ought to be struck out.

We have now only to view the case in the mode in which His Honor the Master of the Rolls, if he had not made the declaration appealed from, would have done; in other words, we have to consider whether any special directions ought to

(1) R. & M. 590. (2) 3 Y. & J. 360. (3) 1 S. & S. 276.

be given, having regard to the facts—1, that it has not been as yet ascertained whether the entire, or indeed any part of the £10,000 ought to be raised; and, 2, that a petition for sale has been presented to the Landed Estates Court. Now, in reference to restraining the proceedings before the Land Judge's Court, I think that is absolutely prohibited by the Judicature Act. The rights of the parties will be considered and given effect to by Monroe, J., and we cannot restrain any party from having an adjudication upon those rights. We can, however, whilst declining to restrain the proceedings, exercise any jurisdiction that remained in the Master of the Rolls, notwithstanding the presentation of the petition, and a learned argument has been addressed to us, as to the nature of the jurisdiction which so remained in His Honor. In my view no part of the jurisdiction, which the Master of the Rolls acquired by the institution of the suit before the presentation of the petition to the Land Judge, could have been affected by that petition. Anything that the Master of the Rolls could have done before the petition was presented, he was at liberty to do, notwithstanding its presentation. His jurisdiction could no more be affected by the presentation of the petition, than the jurisdiction of Monroe, J., could have been affected by the institution of the suit before the Master of the Rolls. Amongst the accounts directed by the Master of the Rolls is one of the charges and incumbrances affecting the estate and of the sums due thereon. One of these charges is the £10,000 in question here, and it was dealt with by the testator's widow, the person beneficially entitled to it, in such a way that any excess of the amount due thereon above such sum, as with the other assets applicable thereto, will suffice for payment of her debts testamentary expenses and pecuniary legacies, is held by the appellants on trust, to apply same in paying off or reducing the incumbrances upon the Rockingham estate of the testator. It seems clear that if it were once ascertained that a sum less than £10,000 were required for these purposes, it would be contrary to equity to allow the trustees to raise by sale, out of the estates, the entire of that sum, or any greater sum than was actually required for the specified purposes. It is equally clear, as Mr. Atkinson has demonstrated, that without a suit for the administration of the estate of the widow the amount, if any, which, as between the

Appeal. 1894.

KING-HARMAN v. CAYLEY.

Palles, C.B.

estate and the owner of the charge, ought to be raised out of the estate, cannot be ascertained, and I am clearly of opinion that such an administration, having regard to the object which renders it necessary, is not within section 39 of the Judicature Act. It is sought not to enable the purchase-money to be distributed, but to determine whether there ought to be a sale at all. I offer no opinion as to whether the necessity of this account being taken constitutes cause against the conditional order for sale, or even whether it will entitle the parties interested to a stay of the proceedings in the Land Judge's Court. All these are matters to be determined by Monroe, J., upon whose functions I am careful not to encroach; but I can decide, and do decide, that the rights of the parties to have a sale can never be determined unless there be an administration in the Chancery Division of the assets of Mrs. King-Harman. I do not wish to enter on the question whether such administration ought to be in this suit or in an independent suit. My own opinion is that it should be in this suit; but whether this be so or not, we are all of opinion that the amount which ought to be raised out of the estate on foot of this charge is limited to the net amount required for payment of the legacies under Mrs. King-Harman's will and her funeral and testamentary expenses. In my opinion, there should be a declaration that the amount to be recovered out of the estate on foot of the charge should be the net amount required, and as that amount cannot be ascertained without an administration of the estate of Mrs. King-Harman, we should give liberty to all parties to take proper proceedings to procure such administration. One thing more we should also do. The suit being one to carry out the trusts of the will, and the trustees of that will having approved of the presentation of a petition for the sale of large estates, on foot of a comparatively small demand, at a time when it was uncertain whether the full amount of that demand, or, indeed, any part of it, ought to be raised, and the infant plaintiff having a contingent interest in the estate, the Master of the Rolls, and this Court, are entitled to consider whether the interests of the minor have been sufficiently protected by the trustees. In my opinion they have not been so protected, and for that reason we should declare the plaintiff to be entitled to use the names of the trustees in resisting before the Land Judge the making of an order

for sale on the petition already presented. But I wish to say that in giving this liberty, the Court is doing no more than safe-guarding the interests of the minor. It does not in any way dictate or suggest the order which ought to be made by Monroe, J., on cause being shown. That learned Judge will of course be bound by the declaration of this Court that more ought not to be raised than is required; but, subject to that, it will be for him to exercise his judicial discretion entirely untrammelled by any opinion of this Court, as to how it ought to be exercised. If either party shall feel aggrieved as to the mode in which it is exercised, it will be open to him to appeal to this Court. Unless and until such an appeal be before us, we cannot express any further opinion on the matter.

FITZ GIBBON, L.J.:—

I have very little to add. The great difficulty I have felt is to consider the real subject-matter of the appeal without allowing my mind to be affected by other considerations.

The declaration of the Master of the Rolls is entirely irrespective of the proceedings before the Land Judge. Although the Master of the Rolls might have expressed his opinion in different terms, the declaration would have been the same, if the petition for sale had not been presented. The declaration is:—"That persons claiming under the will of the testator as specific legatees of incumbrances affecting the Rockingham and Ballinamuck estates are bound to accept payment of such incumbrances under the trusts of the said will for the discharge thereof by receipt and accumulation of the rents or otherwise as the Court may direct."

It is, therefore, a declaration that those who are specific legatees of incumbrances are placed at a disadvantage, from which the other legatees and the other incumbrancers are free. I can add nothing to the explanation given by the Lord Chancellor and the Lord Chief Baron as to the true position of the testator and the general scheme of his will. He was dealing with two distinct pieces of property. One of those properties was his beneficial interest in his landed estates, which was subject to charges and incumbrances which are, I am afraid, on a colossal scale, quite in proportion to the estate itself.

Appeal. 1894.

KING-HARMAN v. CAYLEY.

Fitz Gibbon, L. J

But of these incumbrances one, a comparatively small item in the mass of charges on the property, belonged to the testator himself and was separately dealt with by his will. That his wife, to whom he gave this incumbrance, should be obliged to look to nothing except the accumulated fund for payment, was a thing which he can never have intended. The very creation of an accumulated fund at all was contingent on the happening of an event which it was a direct object of the testator to prevent, namely, the marriage of his daughter without consent. If his daughter did not marry at all, or married with her mother's consent, or if Mrs. King-Harman had died before her daughter married, there would have been no accumulated fund, and there would have been nothing to disturb the priority or rights of the legatees of the charge, and the anxiety of the testator to preserve the Rockingham estate could not have had the effect of putting any term or condition upon the owners of the charge. But again, the accumulated fund itself was only the surplus of the rents, after payment of interest on the charges: it was a surplus of unknown amount, and was, in my opinion, not to be increased by impounding, as it were, any of the prior charges on the property.

When the trust for accumulation arose, the trustees were to accumulate the surplus income, and to spend it, *independent of priority*, in paying incumbrances. That provision affords, to my mind, conclusive evidence of the testator's desire to prevent the Rockingham estate from being sold, and to do so by enabling the trustees to pay off any specially urgent creditors. Therefore, upon the face of this will, the power of discharging incumbrances, irrespective of priority, seems to me to indicate that the testator looked to the trustees to pay off the most pressing demands in order to save the estate from sale, but that he did not think of imposing any conditions or restrictions upon the incumbrancers.

We cannot regard Mrs. King-Harman otherwise than as a legatee of a specific incumbrance; and to hold that she was debarred from raising the charge, except out of the accumulated fund, would have, in fact, postponed her to all the other incumbrancers, and might peril her charge by restricting her to a contingent accumulated fund, which might never arise, and which would be

the first to fail if the estate had proved insolvent—an event not altogether impossible, even in the case of this large estate.

There is really no more to be said on this declaration, and it appears to me that we ought simply to strike it out. But I believe that it never would have found its way into the decree, had it not been for the confusion arising from the circumstances subsequent to the death of Mrs. King-Harman. Mrs. King-Harman made her will on the 30th September, 1889, and the codicil was not made until June, 1890, after and plainly on account of her daughter's marriage, which took place in May, 1890. She had become owner of the estate, subject to the incumbrances, for her life, and she was the owner of this charge. She had used part of the £10,000 charge, substantially in ease of the estate, by giving it as a security to Montague Jocelyn King-Harman, on the terms of his postponing payment until a year after her death. Her legacies were of moderate amount, considering her large income, and she seems to have had very few debts, for her bank overdraft was only an anticipation of accrued rents. She made provision for leaving a large amount of property to go with the Rockingham estate, and in the codicil the final trust practically applies all her residuary property in ease of the Rockingham estate, and to discharge incumbrances on it.

Subject to some possible questions, this lady showed by her will that she had an intention and desire that the Rockingham estate should not be sold, but that it should be kept in the family, and enhanced, in accordance with the wishes of her husband, and she gave what she plainly regarded as a substantial residue to assist this object. Such are the circumstances under which, less than two months after her death, the petition for sale was filed by those to whom she left the charge. The petition was verified by the same solicitor who, as solicitor in this suit for defendants in the same interest, in their statement of defence four days before, had stated that it was impossible to say what the claims against the estate were, and had given no hint that a sale was impending, or even likely. The question of appointing a Receiver was brought before the Master of the Rolls, not for payment of incumbrances, but in the interest of the beneficial owners, and the Master of the Rolls referred the selection of

Appeal. 1894. KING-HARMAN v. CAYLEY. Fitz Gibbon, L. J.

the Receiver to the Land Judge, and one of the questions now to be answered, with a vital bearing on the good faith of this petition for sale, is whether it would have ever been presented if the petitioners had carried their candidate for the Receivership. On the face of the petition for sale, there is a reference to the administration suit and to the appointment of the receiver, but there is no statement that there was any pressure, or any necessity, to raise the charge. In the schedules to the petition, the rental and the incumbrances are set out at great length, and in a way that shows not only that the petitioners knew all about their security, but that their solicitor must have had the petition ready for one Court when he was filing the statement of defence in the other.

The Chief Baron is of opinion that the Judicature Act has taken away the jurisdiction from the Court of Chancery of interfering by injunction with other Courts, and I accept his authority that this is now the law. But it is a strange result of an Act passed to prevent multiplicity of actions, that the control of the Court of Chancery over unnecessary or improper litigation affecting property in course of administration in that Court, can no longer be directly exercised. The necessary inference, in my mind, is that whatever powers the Court of Chancery might and ought formerly to have exercised may, and ought, now to be exercised by the other Court, for the Judicature Act has not altered rights, nor made any proceeding proper that would formerly have been wrong. The duty of the Court as a whole has not been changed, though one Division may no longer have direct control over another. What, then, is the duty of Chancery? To see that the case is presented to the Land Judge in such a way that he shall have all proper information to enable him to decide whether the sale should not be stayed, and to see that he is informed of all the facts and arguments tending to show the character of the proceeding which has been taken in his Court, so that he may deal with that proceeding as it deserves. We have stated on our order that proceedings may be taken before Judge Monroe with any one or more of three objects. We have no right to anticipate what the order of the Land Judge will or ought to be, but we give the carriage of the proceeding before him to those who can be trusted to bring it forward fairly; we give them leave to use the

names of the trustees, because the action of the trustees is impeached. It is not reasonable to send the parties to the Land Judge without stating clearly what we think worthy of his consideration, and I think it right to mention what I understand to be the matters which the parties ought to bring before him. We have been told that the Land Judge, whenever he finds that an incumbrance exists, holds that he is bound to make an absolute order for sale. I cannot believe either that this is so, or that Judge Monroe has ever so held, as a rule without exception. If he should find that an estate will provide, in the course of a few months, a fund sufficient and available to discharge a petitioner's demand; if he finds that the person presenting the petition knows that the sale will never take place; if the petition is presented hastily and for an indirect purpose, and if it can only result in useless annoyance or expense; I cannot doubt the jurisdiction of the Land Judge to dismiss it, with or without express reservation of liberty to present another petition at a subsequent time, if occasion should so require.

Again, if trustees, whose primary duty was to have used the fund which they held to prevent a sale, had favoured or promoted a sale, it might be within the jurisdiction of the Land Judge to dismiss their petition, or to discharge the conditional order, as an improper proceeding, if it appeared that the fund was not endangered by so doing. If a petition is premature, or has been filed before it can be ascertained to be necessary, it can be stayed for a time. When this petition, the matter of it, the time at which it was presented, the parties to it, the manifest intention of Colonel King-Harman and his wife that a sale of the estate should be prevented if possible, are considered; when it is seen that proceedings are actually pending for the administration of the whole property; that only so much of this £10,000 as is required to pay Mrs. King-Harman's debts and legacies can ever be required to be raised; that all the rest is, in effect, to sink into the estate itself; and when it is seen that the petition has been filed by people who know that the amount to be raised has not yet been ascertained, and that, in the end, it may not be much, or even anything, the Land Judge can at least stay the proceedings; he may think that the facts amount to sufficient cause for discharging the conditional order, or even for dismissing the petition,

Appeal. 1894. KING-HARMAN v. CAYLEY. Fitz Gibbon, L. J.

and he may consider how to prevent those who have taken the proceeding from throwing the expense of it, directly or indirectly, upon the property which they have brought into his Court. But that the Rockingham estate should be now brought to a sale for payment of the charge which Colonel King-Harman bequeathed to his wife, and which she largely devoted to the benefit of the estate, is a result which, as the case stands at present, I do not regard as likely to be attainable by any legitimate proceeding.

Solicitors for the plaintiffs: *Stanuell & Son.*
Solicitor for executors of Mrs. King-Harman: *Clifford Lloyd.*
Solicitors for Colonel Montague Jocelyn King-Harman: *Whitney & Moore.*

R. D. M.

V.-C. 1894. Feb. 27.

POIREZ *v.* COLLUM.

(1891. No. 12,842.)

Practice—Costs—Taxation between party and party—Briefs for trial—Instructions for—Copies of deeds—Extracts—R. S. C. I., April, 1878, *Ord. VII., Sch. Items* 75, 95, 105, 106—*R. S. C. I., June,* 1882, *Rule* 2, *Sch. Item* 15.

In a taxation, under the Orders and Rules in force previous to the R. S. C. I., July, 1893, of costs between party and party, the Taxing Master disallowed charges for full copies in the briefs for trial of lengthy deeds, and allowed for 30 folios in respect of each deed only, at 4*d.* per folio:—

His ruling upheld.

The discretion of the Taxing Master, as to the amount to be allowed for instructions for briefs for trial, not interfered with by the Judge.

SUMMONS to review taxation.

The action was brought to have it declared that an annuity of £200 was well charged on certain lands of Clonavoan and Drumcoe, personal judgment for the arrears due, a receiver, and other relief.

The statement of claim stated a deed of the 8th November, 1866, by which Gordon Archdall and Robert Archdall granted to one of the plaintiffs an annuity of £200, charged on the lands

of Ring, Clonavoan, Drumcoe, Drumbane, and Drumrane. Ring, Drumbane, and Drumrane were ordered to be sold in the Land Judge's Court, and a receiver was appointed. Arrears of the annuity were due; the defendant and his wife had been in possession of Clonavoan and Drumcoe, claiming a right thereto under some title, with the particulars of which the plaintiffs were unacquainted. The defendant's wife died, having devised and bequeathed her real and personal estate to the defendant, who was still in possession of the said lands.

The defence alleged that the deed of 1866 was not fully stated in the statement of claim, and referred to it, and to a deed of settlement of the 30th December, 1837, therein recited. It stated a deed of the 12th February, 1874, by which the lands of Clonavoan, and that part of Drumcoe, known as Kilmalanafy, were conveyed to the defendant's wife, and a deed of the 30th August, 1876, by which the same lands were put in settlement. By the latter deed, Robert Archdall, in exercise of a power conferred by the settlement of the 30th December, 1837, appointed to the defendant's wife that part of the lands of Belview, otherwise called Drumcoe, containing eighty-two acres, and she conveyed same to trustees, and the defendant denied that the lands of Belview were ever subject to the annuity. The defendant admitted the right of the plaintiff to have a receiver over Clonavoan and that part of Drumcoe, known as Kilmalanafy.

The action came on for trial on the 6th July, 1892, when judgment was pronounced in favour of the plaintiffs, with costs.

The following are five of the items in the plaintiffs' bill of costs, with the deductions made by the Taxing Master:—

	Professional charges. £ s. d.	Deductions. £ s. d.
101. Instructions for brief, including the perusal of deeds numbering over 1000 folios, correspondence with several parties in order to discover certain original deeds which were necessary, and attendances connected therewith, and for all business connected with the identification of the lands of Drumcoe, in order to support the plaintiffs' case, ...	21 0 0	13 13 0

V.-C. 1894.		Professional charges. £ s. d.	Deductions. £ s. d.
POIREZ *v.* COLLUM.	102. Draft brief, 126 folios,..	6 6 0	0 6 0
	103. Copy same for Serjeant Jellett, including pleadings, deeds, &c., 1067 folios, ..	17 15 8	8 4 0
	107. Brief for Mr. Robertson, Q.C., ...	17 15 8	8 4 0
	111. Brief for Mr. Bourke, ...	17 15 8	8 4 0

Copies of ten deeds were briefed to counsel. The allowance for draft brief (item 102) did not include any charge in respect of the copies of the deeds.

The plaintiffs objected to the deductions in respect of items 101, 103, 107, and 111.

The following reasons were given by the Taxing Master (Master Davis) for his ruling :—

101. This charge is for instructions for brief, charged at £21. I have allowed £7 7*s.*, and disallowed £13 13*s.* I am of opinion that £7 7*s.* for instructions is sufficient, and a reasonable remuneration for the work done, having regard to the difficulties in the case, the evidence necessary, and the length of briefs.

103, 107, and 111. These items are for briefs charged at 1067 folios, £17 15*s.* 8*d.* I have disallowed for such brief £8 4*s.*, arrived at by reducing the full brief of certain deeds of great length to extracts of those deeds, the question in the case being confined to the identity of certain lands dealt with by the deeds. This is the usual practice, and is in accordance with the intention of the schedule of solicitors fees, viz. item 95 of present schedule, and item 15 of supplemental schedule of 1882, where a draft brief is allowed for at 9*d.* and 1*s.* a folio. According to scale for abstracts of documents "too long to brief," I have allowed £6 for a draft brief in this case, and 30 folios for copy brief of each of the long deeds which were not abstracted.

The plaintiffs appealed from the taxation, and the case came before the Vice-Chancellor on the 12th December, 1893, when he decided that, as to item 101, he would not review the Taxing Master's discretion; but, having regard to counsel's argument, (see *infra*), that if full copies of the deeds were not to be charged for at 4*d.* per folio, the portions allowed should be treated as abstracts, and paid for at 1*s.* per folio, he considered that the

attention of the Taxing Master ought to be called to this point, and allowed the matter to stand for a report from him on the subject (1).

The Taxing Master, on the 14th December, 1893, reported as follows:—

As requested by the Registrar, I beg to report—That the Rules of Taxation make no provision for allowance to solicitors for abstracts of deeds and documents too long to be copied.

The Rules of Taxation under the old system previous to the recent rules provide that in preparing a draft brief an abstract of deeds or documents too

---

(1) The following are the items in the schedule to Order VII. of the Rules of the Supreme Court of Judicature (Ireland), April, 1878, which bear on the case:—

INSTRUCTIONS.

75. For brief on hearing or trial of action, upon notice of trial given, whether such trial be before a Judge, with or without a jury, or on trial of an issue of fact before a Judge, or Commissioner, or on assessment of damages—Lower scale, £1 1*s.*; higher scale, £1 11*s.* 6*d.*

For such brief, and for brief on the hearing of an appeal, when witnesses are to be examined or cross-examined, such fee may be allowed as the taxing officer shall think fit, having regard to all the circumstances of the case, and to other allowances (if any) for attendances on witnesses and procuring evidence.

The fees for instructions for brief are not to apply to a hearing on further consideration.

DRAWING PLEADINGS AND OTHER DOCUMENTS.

95. Drawing brief for trial or on hearing of cause, issue of fact, assessment of damages, examination of witnesses, demurrer, special case and petition before a Court or Judge, sheriff, commissioner, or officer of the Court, when necessary and proper, to comprise necessary and proper observations, statement of case, testimony of witnesses, and abstracts of documents too long to brief—Per folio: lower scale, 7*d.*; higher scale, 10*d.*

COPIES.

105. Briefs of all proper and necessary documents—Lower scale, 4*d.*; higher scale, 4*d.*

106. Copies of documents, where no other provision is made, at per folio—Lower scale, 4*d.*; higher scale, 4*d.*

By the Rules of June, 1882, the charges at item 95 were raised to 9*d.* and 1*s.* in the lower and higher scales respectively.

V.-C. 1894.

POIREZ v. COLLUM.

long to brief shall be charged at 9*d.* per folio, lower scale, and 1*s.* per folio, higher scale.

Although such is the rule, the practice is obsolete. Solicitors never do make an abstract of deeds or documents as draft brief. A draft brief is composed of the case and evidence and necessary observations. In practice in all the Taxing Masters' departments the following rule is observed :—Where deeds or documents are too long to brief in full, so much only is allowed in the copy brief for counsel as will be sufficient to enable counsel to state the effect of the deed or document in relation to the question at issue. The charge therefor is 4*d.* per folio, being the same as for the copy of the other parts of the brief.

For brevity, I refer to Bewley on Costs, page 42, and Schedule of Fees, Appendix xxviii., item 165; General Order, Chancery, 1843, Darley, p. 166, Order CLVII.; Schedule of Fees of 1878 (Judicature Act), item 95 (Ledwich on Costs, p. 72), and Supplemental Schedule of Fees of 1882 (Ledwich, 72A).

I have read this report to my colleagues, who concur with me on the practice as I have stated it.

An affidavit of one of the solicitors for the plaintiffs stated, amongst other matters, that from the recitals in the settlement of the 30th December, 1837, and by the recited deeds, and other deeds relating to the title to the lands of Drumcoe, the plaintiffs were able to prove that the lands of Drumcoe, settled by the deed of the 30th December, 1837, and afterwards appointed and charged by the deed of the 8th November, 1866, were distinct from, and did not comprise any part of, the lands of Kilmalanafy, but did comprise that part of Drumcoe called Belview. The deeds on which, in addition to the settlements of 1866 and 1837, the plaintiffs relied were a lease of Drumcoe, dated the 19th April, 1784, a sub-lease of part of Drumcoe, called Belview, dated the 7th April, 1788, a mortgage of Drumcoe and Kilmalanafy and other lands, dated the 1st January, 1804, and a perpetuity lease of Belview, dated the 5th June, 1848. Part of Kilmalanafy, consisting of 14 acres, had latterly also acquired the name of Drumcoe. The plaintiffs' counsel considered it necessary to refer to the recitals relating to these lands. The deponent referred to passages marked by the leading counsel, and stated that before briefing the said documents he carefully considered the directions of counsel, and the possibility, consistently with safety to the interests of his clients, of dispensing with full copies of the deeds, and came to the conclusion that it would be imprudent, and attended with

great risk to his clients, if full copies were not sent to counsel. The plaintiffs' senior counsel had given certificates that it was necessary that full copies of the deeds should be briefed. The Taxing Master had allowed for full copies of the settlement of the 8th November, 1866. Since the matter was last before the Court, the deponent had had such an abstract made of the settlement of the 30th December, 1837, as would have been necessary. This contained 200 folios, the charge for which, at the rate allowed in item 95 (Sch. 1878), would be £10, and for each copy, at 4*d.* per folio, £3 6*s.* 8*d.*, whereas for each copy the Taxing Master had allowed only 10*s.*

Kenny, Q.C., for the plaintiffs:—

The Taxing Master refers to "extracts," and allows for extracts only from the deeds. No provision is, however, made in the costs schedules for extracts. Copies in full are provided for, as are also "abstracts"; but in the latter case, where the solicitor has to take the trouble and responsibility of abstracting the document, he is allowed 9*d.* or 1*s.* per folio, instead of 4*d.*, the rate allowed for mere copies.

In such a case as the present the great responsibility should not be thrown on the solicitor of selecting the portions of the deeds which are material, and briefing these only. He could not, in this case, have briefed only the parcels, and omitted the uses and trusts and the important recitals. Here the defendant contended that the charge on Drumcoe affected that part of it only called Kilmalanafy, and that Belview was not subject to the annuity. The recitals in the deeds mentioned in the defence threw the title back to before the year 1800, and this had to be investigated. Here, moreover, though allowing for only portions of the deeds, the Taxing Master cuts down the charge to 4*d.*, whereas the 300 folios allowed by him in each brief would, at the rate prescribed by item 95, come to £15. The draft brief (item 102) does not include copies of the deeds, and a further draft would have been necessary if an abstract of those deeds should have been made.

[The following cases were referred to by counsel in his argument: *Executors of Longfield* v. *Keane* (1), *Byrne* v. *Hargrave* (2),

(1) 2 F. & Sm. 111. (2) *Ibid.* 142.

V.-C. 1894. POIREZ v. COLLUM.

Beamish's Trusts (1), *Jessop* v. *Cusack* (2), *Mahalm* v. *M'Cullagh* (3).]

There was no appearance for the defendant.

THE VICE-CHANCELLOR:—

I feel some difficulty in dealing with this case, but I think that the claim put forward by the plaintiffs' solicitors goes much beyond what they are entitled to. The question does not arise so much with reference to the settlement of 1866 as with respect to deeds of a much earlier date, composed largely of provisions as to matters irrelevant to those in controversy in the action—powers of appointing new trustees, personal covenants, provisions as to a policy of assurance, &c. I can interfere with the Taxing Master's decision only on matters of principle, and I think he acted on a right principle in ruling that there must be a selection between relevant and irrelevant matter. There appears to be no intermediate charge in the schedule between that for abstracts and that for copies, and extracts are supposed to be in the same position as copies, and are paid for at the same rate, 4*d.* per folio. The Taxing Masters, referring to the rule as to abstracts, report that it is obsolete, that abstracts are never made in such case, and that where documents are too long to brief in full, so much only is allowed in the copy as will enable counsel to state the effect of the document in relation to the question at issue, and that the charge therefore is 4*d.* per folio, the same as for the copy of the other parts of the brief. This being the settled practice, I do not think I can interfere with it. The portions of the briefs in question are not abstracts: they consist of mere copies. I refuse the application.

Solicitors for the plaintiffs: *Barrington & Son.*

D. M'C. M.

(1) 5 Ir. L. T. R. 104. (2) 25 L. R. Ir. 244, 247, 250.
(3) 31 L. R. Ir. 147, 153.

SPURWAY *v.* SPURWAY AND ANOTHER.

(1893. No. 197.)

M. R.
1893.
July 8, 22.

Appeal.
Oct. 26, 27.

Practice—Writ of summons—Service out of the jurisdiction—Domicil—Abandonment of original domicil—Permanency of residence—Proof of intention—Acts indicating intention after threat of legal proceedings—R. S. C., Ireland, 1891, *Order XI., Rule* 1.

S. was born in 1868 in Ireland, where his father was temporarily located. In 1873 he returned with his father to England. In 1883 he went to Cannes to live with his uncle, by whom he was supported and maintained, and who had resided there for several years, following the profession of a teacher of languages.

In 1887 S. came to Birmingham for the purposes of studying pharmacy. In the same year his father acquired an Irish domicil, having purchased a house in Ireland, where he resided with his family till the beginning of 1893, when he sold his property there. S. paid occasional visits to his father's home in Ireland. In 1890 he returned to his uncle at Cannes. On the 25th March, 1892, he married the plaintiff, who was the widow of a French gentleman, the ceremony being performed at the British Consulate at Nice. At the date of this marriage the plaintiff was entitled to considerable personal property, and some real estate in Jersey. Shortly after her marriage the plaintiff left S., and, through her solicitor, threatened legal proceedings against him and his uncle, alleging that they (in breach of an antenuptial agreement) had obtained by fraud and violence a portion of her property, and had by similar means induced her to sign a bill of exchange or promissory note for 30,000 francs. Subsequently, by deed dated the 20th September, 1892, S. and his uncle entered into partnership with H., to carry on a business at Cannes. On the 10th October following S. registered himself with the Mayor of Cannes as having declared his wish "*établir (ou) avoir établi sa residence à Cannes*":—

Held, that S. was not "domiciled" within the jurisdiction, and that no writ could be served on him out of the jurisdiction.

On the hearing of the application to discharge the order for service out of the jurisdiction an order was made by the Master of the Rolls for the attendance of the defendants for cross-examination on their affidavits in the case, on the terms that no legal process should be served on either of them coming to Ireland, remaining, or going away within a reasonable time.

M. R. 1893.

SPURWAY v. SPURWAY.

THE plaintiff, by her writ of summons in the action, claimed:—(1) An account of stocks, funds, shares, securities, bonds, and moneys of the plaintiff received by the defendants, or either of them, since March, 1892; (2) an order declaring the plaintiff entitled to all such stocks, &c., for her separate use by virtue of an antenuptial agreement between the plaintiff and the defendant Marcus Spurway, and that the said Marcus Spurway is a trustee for the plaintiff of all such stocks, &c.; (3) an order directing the defendants to deliver up or transfer to the plaintiff all such stocks, funds, shares, securities, bonds, and moneys, and for an injunction to restrain the defendants, or either of them, from dealing with any of the said stocks, &c., in the meantime; (4) payment to the plaintiff of all moneys received by the defendants from plaintiff or for her separate use; (5) an order that the defendant Marcus Spurway shall execute all such deeds and documents, and do all such acts as may be necessary for the purpose of assuring to the plaintiff all property, real and personal, moveable and immoveable, as belonged to her previous to her marriage with the defendant Marcus Spurway, in pursuance of an agreement entered into by the plaintiff and the defendant previous to their marriage; (6) a declaration that a certain bill of exchange or promissory note passed by the plaintiff to the defendant Herbert O'Donoghue for the sum of 30,000 francs is fraudulent and void and ought to be delivered up to be cancelled, and for an injunction to prevent the defendants, or either of them, from negotiating the same or suing the plaintiff.

The plaintiff was born in Jersey, and previous to her marriage with the defendant Marcus Spurway was the widow of a French gentleman. She was possessed of a considerable amount of personal property, and was entitled to real estate in the island of Jersey. On the 25th March, 1892, she married the defendant Marcus Spurway, the ceremony being performed at the British Consulate at Nice.

The defendant Marcus Spurway was born at Dundalk, in Ireland, on the 28th June, 1868, where his father was temporarily located in the discharge of his duties as a civil servant in the Inland Revenue. In 1873 his father returned to England, where he resided for about ten years. In 1883 his father sent Marcus Spurway

to his uncle, the defendant O'Donoghue, who was a teacher of languages at Cannes, in France. Marcus Spurway remained at Cannes with his uncle till 1887, when he removed to Birmingham, according to his own statement, for the purpose of studying medicine, with a view of becoming a doctor, and practising in France. In 1890 he returned to Cannes. In 1887 the father (having retired from the Civil Service), purchased a residence at Castlelost, in the county Westmeath, where he lived until February, 1893, when he sold his house, and went to reside at Cannes. Marcus Spurway paid short occasional visits to his father at Castlelost. After his marriage with the plaintiff in 1892 disputes arose between them as regards money matters, the plaintiff alleging that the defendants had obtained by fraud and violence certain moneys and securities amounting to £12,000, and had induced her by threats and misrepresentations to sign a bill of exchange or promissory note for 30,000 francs in favour of the defendant O'Donoghue. She also alleged the breach of an antenuptial verbal agreement by her husband to settle her property on herself. In June, 1892, she left Cannes, and went to Jersey and consulted a solicitor. She refused to see the defendant Spurway, who followed her to Jersey. The defendant Spurway then left for Ireland, and stayed for a short time with his father at Castlelost. On the 17th September, 1892, while at Castlelost, he signed a power of attorney authorizing the defendant O'Donoghue to execute on his behalf a deed for the purpose of entering into partnership with Monsieur Hermitte, who carried on a perfumery business at Cannes. Accordingly, a partnership deed was executed on the 20th September, 1892, between Monsieur Hermitte and the defendants for the purpose of carrying on the business of a perfume manufactory and distillery, under the name of Hermitte, Spurway & Co., for a term of ten years, ending the 20th September, 1902, the profits to be allocated thus: 50 per cent. to Hermitte and 25 per cent. to each of the other partners. The losses were to be adjusted in similar proportions. The contribution of the defendants to the concern was fixed at 40,000 francs. Article 6 of the partnership deed provided that all the partners, except the defendant O'Donoghue, should devote the whole of their time to the business. Article 21 provided that, "for the execution of these presents, the parties elect domicil at Cannes

M. R. 1893.

SPURWAY *v.* SPURWAY.

in their respective residences." On the 10th October, 1892, the defendant Spurway obtained from the *Maire* of Cannes the following document :—

RÉPUBLIQUE FRANÇAISE.

DÉPARTEMENT DES ALPES MARITIMES,
COMMUNE DE CANNES,
ARRONDISSEMENT DE GRASSE.

En execution du décret du 2 Octobre, 1888, par devant nous, maire de la Commune de Cannes s'est présenté le sieur Spurway Marcus Humphrey.

Fils de Humphrey et de Elizabeth O'Donoghue, né a Dundalk (Irlande), le 28 Juin, 1868.

Nationalité, Anglaise.
Dernier Domicile, Londres.
Profession, Rentier.

Marié à Sophie de Carteret, 32 ans, Anglaise. Pièces justicatives. Certificats d'identité—lequel nous a declaré vouloir établir (ou) avoir établi sa residence à Cannes.

Rue Bd. de Croisette, Villa du Grand Hotel, département des Alpes Maritimes.

Fait à Cannes, le 10 · 8 · 1892.

LE MAIRE.

In consideration of admission into the business the defendant Spurway, according to his evidence, paid to Monsieur Hermitte the sum of 20,000 francs out of money which had been his wife's.

As regards the defendant O'Donoghue, he was born at Mitchelstown, in Ireland. He had lived at Cannes since 1867, where he followed the profession of a teacher of languages, having taken out letters of civil rights under French law.

On the 18th February, 1893, the plaintiff obtained leave to issue and serve a writ out of the jurisdiction on each of the defendants.

On the 8th July, 1893, an application was made to the Master of the Rolls on behalf of the defendants that the order of the 18th February, 1893, should be discharged, on the grounds that the defendants were not British subjects domiciled within the jurisdiction, and also that the cause of action was not one in respect of

which the plaintiff was entitled under Order XI. of the Rules of 1891 to obtain an order for service out of the jurisdiction.

In the affidavits of the defendants, filed in support of the motion, the charges of fraud, misrepresentation, and violence were denied; and it was stated that the 30,000 francs for which the promissory note was given was money advanced by the defendant O'Donoghue to the plaintiff, and handed over to her husband at her request. The defendant Spurway in his affidavit stated that the money invested by him in the partnership business had been voluntarily given him by the plaintiff.

During the argument on the hearing of application the Master of the Rolls made an order that the defendants should attend for cross-examination on their respective affidavits, on the undertaking of the plaintiff not to serve them with any legal process either while coming, remaining, or going away within a reasonable time; and the further hearing was adjourned till the 22nd July, 1893.

On the 22nd July both the defendants attended the hearing of the motion before the Master of the Rolls, and were cross-examined by counsel for the plaintiff.

A. F. Blood (with him *Matheson*, *Q.C.*), in support of the motion:—

None of the provisions of Order XI., Rule 1, authorize service on either of these defendants out of the jurisdiction.

Neither of them are "domiciled" within the jurisdiction: *Udny* v. *Udny* (1); *Douglas* v. *Douglas* (2); *Brunel* v. *Brunel* (3). There is ample proof of intention to settle in a new country as a permanent home, and the domicil of origin is lost. The *animus manendi* is abundantly proved. They are ordinarily resident in France. There is a combination—firstly, of the fact of an intention to reside permanently in France, and secondly, of the fact of residence there, and that is sufficient: *Hamilton* v. *Dallas* (4); *Chalmers* v. *Wingfield* (5); *Watkins* v. *The Scottish Imperial Insurance Company* (6); *Bell* v. *Kennedy* (7); *Doucet* v. *Geoghegan* (8).

(1) L. R. 1 H. L. (Sc.) 441.
(2) L. R. 12 Eq. 617.
(3) *Ibid.* 298.
(4) 1 Ch. Div. 257.
(5) 36 Ch. Div. 400.
(6) 23 Q. B. Div. 285.
(7) L. R. 1 H. L. (Sc.) 307.
(8) 9 Ch. Div. 441.

M. R. 1893. SPURWAY v. SPURWAY.

As regards the defendant Spurway there is no proof that he ever had an Irish domicil.

Meredith, Q.C., and *Samuels*, *contra*:—

We are entitled to uphold the order for service out of the jurisdiction. While the defendant Spurway was an infant, his father purchased a house in Ireland, and made it his home and residence. He then, at any rate, acquired an Irish domicil, and the son's domicil followed that of the father. Dicey on "Domicil," pp. 5 and 6. The defendant O'Donoghue never lost his Irish domicil. The *onus* of proving a change of domicil lies on the parties alleging it, and the clearest evidence will be required: *Bell* v. *Kennedy* (1). Every presumption is made in favour of the domicil of origin, and there must be conclusive proof of its abandonment: "*The Lauderdale Peerage*" *Case* (2); *Somerville* v. *Somerville* (3).

In this case there is no evidence of an intention on the part of the defendant Spurway to acquire a French domicil until after the threat of legal proceedings by his wife, and the absence of an intention to return must not be an *animus* to evade the demands of creditors, or avoid legal proceedings. See judgment of Lord Westbury in *Udny* v. *Udny* (4). No weight can be attached to the partnership deed, having regard to its date. The money paid by the defendant Spurway to Hermitte as a consideration for admission to the business, was the plaintiff's money, and is part of the subject-matter in dispute. All the circumstances show that the arrangement was not a *bonâ fide* transaction. It alone cannot prove a change of domicil, and unquestionably up to that time the domicil of the defendant Spurway was Irish: *Attorney-General* v. *Rowe* (5); *D'Etchegoyen* v. *D'Etchegoyen* (6).

We ask for an injunction to prevent the defendants suing on the bill of exchange, which could be sued on in Ireland, and that brings us within sub-sect. (*g*) of Rule I. of Order XI. We contend we are also entitled to maintain the order for service out of

(1) L. R. 1 H. L. (Sc.) 307.
(2) 10 App. Cas. 692.
(3) 5 Ves. 749.
(4) L. R. 1 H. L. (Sc.) 458.
(5) 1 H. & C. 31.
(6) 13 P. D. 132.

the jurisdiction under sub-sect. (*c*). The sub-sections are to be read disjunctively, and each is independent of the others: *Tassell* v. *Hallen* (1).

M. R. 1893. SPURWAY *v.* SPURWAY.

[The following authorities were also referred to: *Munro* v. *Munro* (2); *In re Marsland* (3); *Potinger* v. *Wightman* (4); *Bremer* v. *Freeman* (5); *Harvey* v. *Harnie* (6).]

THE MASTER OF THE ROLLS:—

July 22.

In this case I should be glad to have been able to come to a different conclusion from that which the facts force on me. The plaintiff is a lady whose name is Sophia Anne Jane Spurway, and she married the defendant, Marcus Humphrey Spurway, in 1892. She herself is a native of Jersey, and had been possessed of a very large property there. She married a French gentleman, and was a widow at the time when she met the principal defendant. Being thus originally a British subject, she acquired a French domicil at the time of her first marriage, and until the institution of the present proceedings, as far as I am aware, she has never set foot in Ireland, and except for the fact of her having married Mr. Spurway she would probably have remained an utter stranger to Ireland.

The defendant Mr. Herbert O'Donoghue is a gentleman who has been residing for a great number of years at Cannes, where he exercises the honourable faculty of a teacher of languages, and has had opportunities of instructing a number of distinguished persons. His profession has proved a source of emolument to himself, and it is not necessary to go further into the details which he states, except to mention that the present Emperor of Germany appears to have been one of his pupils. I mention this merely because his position, if not his character, was somewhat severely dealt with in argument and on cross-examination. The principal defendant is Marcus Humphrey Spurway, and, so far as the present case is concerned, the facts relating to his domicil are these:—His father was an Englishman, in the Civil Service, and in the

(1) [1892] 1 Q. B. 321.
(2) 7 Cl. & Fin. 842.
(3) 55 L. J. Ch. 581.
(4) 3 Mer. 67.
(5) 10 Moo. P. C. 306.
(6) 5 P. D. 153.

M. R. 1893.

SPURWAY v. SPURWAY.

fulfilment of his duties as a civil servant he was stationed temporarily at Dundalk, where Marcus Humphrey Spurway was born in 1868. When he was about five years of age he went with his father to England, and remained in England till he was about fifteen.

During that time his father had not acquired, as far as I know, any domicil but his English one, which he would have retained till it had been altered by some act on his part. Subsequently, on his retirement from the service, his father purchased a place called Castlelost, in the county Westmeath, and I entertain no doubt that this purchase of a house for the settlement of his family, who had no other home, indicates in the strongest manner that his intention was to reside permanently in Castlelost, and that he did all things necessary to acquire a domicil in this country. Therefore, the defendant Marcus Humphrey Spurway being his son, his domicil followed that of his father. The circumstance of his having been born in Ireland would not give him an Irish domicil, for that would remain English until his father had changed his English domicil for an Irish one. His domicil, while he was under age, would follow that of his father. However, when he was about fifteen, he went abroad to Cannes, where his uncle, the defendant Herbert O'Donoghue, was residing, and since 1883 till the present time he has not come to Ireland except on a few occasions for very short visits, lasting a few days or a week at a time, and once, under special circumstances, when there was a death in the family, remaining for a couple of months.

But during this period he did not reside all the time at Cannes. He was for three years in Birmingham for the purpose, as he says, of studying pharmacy, with the view of becoming a practising doctor in France. I do not know why Birmingham was selected for this purpose; that is a matter which was his own concern, and it is not suggested that he ever intended to reside in Birmingham. Indeed, according to the evidence, he was supported by his uncle during his stay in that town, as he had been at Cannes.

These persons—Mr. and Mrs. Spurway—met at Nice, and they were married at the Consulate there. The lady originally came from Jersey. She was married in France. She has

no property in Ireland, and never was in Ireland till quite lately. She seeks to sue persons who have practically resided the greater part of their lives at Cannes in France. It follows, then, that it is not a matter of course that liberty should be given to serve the writ in this action. Our Courts are primarily for the subjects of the realm, and not for the purpose of deciding questions or settling disputes between foreigners, even though British subjects; but no doubt such persons can sue, if they come within the terms of the Act of Parliament, without which this could not be done. In this case I should be rather glad if I could see my way to allow the institution of proceedings: not because I have formed any opinion on the rights in controversy, but because I am satisfied that unless the defendants can be made amenable to the tribunals here there is probably no Court to which the plaintiff can appeal, and therefore her wrongs, if they exist, must, so far as human law is concerned, remain unredressed. I should therefore have been willing to have the case tried here. The plaintiff has been advised that the English Courts are not open to her; she has been advised that there are insuperable difficulties in the way of proceedings in Jersey or in France. And, if her case is true, it is one of very gross fraud and grievous wrong. She says she has been defrauded out of property and bonds of a large amount, and induced to sign a bill of exchange for 30,000 francs against her will, and without knowing the purport of the transaction—that is, if she tells truth. When the case came first before me I had very great difficulty in making the order, and only did so in order that the question of jurisdiction might be decided on an application to set aside the order. When I heard the affidavits, it was plain that there were facts shown which, if true, would deprive me of jurisdiction to have the case tried here. Order XI., Rule 1, sub-section (*c*) provides for the service of a writ out of the jurisdiction when "any relief is sought against any person domiciled or ordinarily resident within the jurisdiction": and that is the clause on which the present question mainly turns; and if Mr. Marcus Humphrey Spurway is a person "domiciled" within the jurisdiction I have power to make the order asked for. Sub-section (*c*) is also relied on, which provides for service out of the jurisdiction

M. R. 1893. SPURWAY v. SPURWAY.

"where the action is founded on any breach or alleged breach within the jurisdiction of any contract wherever made, which according to the terms thereof, ought to be performed within the jurisdiction, unless the defendant is domiciled or ordinarily resident in England or Scotland"; and again, there is a third ground put forward to support the application in sub-section (*g*) which provides for service where "any injunction is sought as to anything to be done within the jurisdiction or any nuisance is sought to be prevented or removed whether damages are or are not also sought in respect thereof."

If the plaintiff cannot bring her case within some one of these three sections, I have no more power to make the order to have the defendants impleaded here than anyone who chances to be now in this Court.

It is contended that the defendants are domiciled within the jurisdiction, and it is on that point that the important question in the case arises. So far as the writ is concerned the plaintiff's claim is:—

1. For an account of all stocks, funds, shares, securities, bonds, and moneys of the plaintiff, received by the defendants or either of them since the month of March, 1892.

2. For an order declaring that the plaintiff is entitled to all such stocks, funds, shares, securities, and bonds for her separate use by virtue of the Married Woman's Property Act, 1882, and by virtue of an antenuptial agreement between the plaintiff and the defendant Marcus H. Spurway, and that the said Marcus Humphrey Spurway is a trustee for the plaintiff of all such stocks, shares, securities, and bonds.

3. For an order directing the defendants to deliver up and transfer to the plaintiff all such stocks, funds, shares, securities, bonds, and monies, and for an injunction to restrain the defendants or either of them from dealing with any of the said stocks, funds, shares, bonds, or securities, in the meanwhile.

4. Payment to the plaintiff of all monies received by the defendants from the plaintiff or for her use.

5. For an order that the defendant Marcus H. Spurway, shall execute all such deeds and documents and do all such acts as may be necessary for the purpose of assuring to the plaintiff all such

property, real and personal, moveable or immoveable, as belonged to her previous to her marriage with the defendant Marcus H. Spurway, in pursuance of an agreement entered into between the plaintiff and said defendant, previous to their said marriage.

6. For a declaration that a certain bill of exchange or promissory note passed by the plaintiff to the defendant Mr. Herbert O'Donoghue and procured by the defendants from the plaintiff for the sum of 30,000 francs or thereabouts is fraudulent and void and ought to be delivered up to be cancelled, and for an injunction to prevent the defendants or either of them from negotiating the same or suing the plaintiff thereon.

Now, if the parties were resident, even though not domiciled, within the jurisdiction, this would be a perfectly good writ. But the question under the present circumstances is, what is it that the plaintiff says gives her a right to have the defendants served, residing, as they do at present, in France. What is Mr. Spurway's domicil? His domicil was that of his father until he attained age. Still in the consideration of the circumstances which have occurred since he reached the age of twenty-one it is impossible to leave out of consideration the position he occupied and the occurrences of the six years before that time, because they throw great light on his conduct after attaining age. It appears that he was adopted by his uncle and that he lived with, and was supported by, him down to the time of his marriage. He was for some time absent from Cannes in England, but this absence is consistent with an intention to return to Cannes, and there has been no suggestion or explanation of it except that he did intend to return there. Therefore, having lived for so long a time with his uncle, with the consent and acquiescence of his father, it would, I think, require a less strong state of facts to show that he did adopt a domicil in France than if he had been living in Ireland until he was twenty-one, and then crossed over to France for pleasure or for his health or for some other reason. According to his evidence he was preparing to practise as a medical man in France. He did not enter any medical school, but he attended some ordinary schools, with a view of acquiring knowledge suitable for preparing for the medical profession. Whether that statement is true or not, it is not an

M. R. 1893. SPURWAY *v.* SPURWAY.

incredible one, and appears to be supported by the probabilities of the case. And even although if he had died the day after attaining age the domicil of his father might have been his, still slight circumstances would induce me to come to the conclusion that he had voluntarily changed it by adopting a residence in France.

However, nothing very positive or definite was done at that time, and his position at Cannes might be consistent with the retention of his father's domicil. He was only going on with his studies, and it may very well be that Mr. Meredith and Mr. Samuels are right in saying that that was consistent with a domicil which at that time was the Irish one of the father, the latter having changed his English domicil to one in Ireland. Nothing very decided, perhaps, was done till he met the plaintiff; and until they were married nothing very material took place, and nothing to effect his domicil, and if he were still domiciled in Ireland at the time of his marriage, and nothing had occurred since then, it would be, in my opinion, my duty to direct the writ to be served out of the jurisdiction. It appears, however, that something very important did take place. There was no marriage settlement executed, and therefore the property of the husband and wife would be subject to the tribunals of France, or if not to them to the tribunals of Jersey, and the Married Woman's Property Act would not apply. It is not important for me to decide which law would affect the property, but it would be either one or the other (the *lex loci* or the *lex rei sitæ*) —the immoveable property seems to have been within the jurisdiction of Jersey, and not within the jurisdiction of this Court. They were married at the Consulate and the marriage must have been performed as if between two persons who were British subjects. I do not think the fact of the marriage would be at all conclusive as to domicil. There is often very great confusion between domicil and allegiance, but counsel in this case have kept clear of it. An Englishman may be domiciled in France or anywhere else he likes, and yet he may live and die an Englishman, and never forfeit his allegiance or his rights as a British subject, but would be subject to British law, and in the event of his taking up arms against his native country would

be guilty of high treason. It is not a question of naturalization. The question is simply what is a man's domicil? I quote from the code of Justinian, as adopted in the judgments of Lords Cranworth and Wensleydale, in *Whicker* v. *Hume* (1). It is the place "*unde non sit discessurus si nihil avocet; unde cum profectus est, peregrinari videtur*"—that is, the place from which a man won't go away unless something calls him away, and from which when he goes away he seems to be a sojourner in a foreign country. Lord Wensleydale quotes the passage more fully, where the element of property is introduced—the place where a man has his *lares*—but in this case it does not appear that at the time of his marriage Mr. Spurway had any property of his own, and that portion of the definition does not apply.

The question of domicil, then, does not depend on allegiance; it does not depend either on documents or papers; it does not depend on certificates of identity, or declarations of having taken up an abode or intending to establish his abode. It has, however, been given in evidence that in October, 1892, after his marriage, Mr. Spurway made a declaration or statement to the effect of his having established or being about to establish himself at Cannes. The form is applicable to either, and it appears in the alternative, though it is obvious that the pen should have been drawn through one or other statement. It does not matter, however, what form it is in. The document indicates an intention to live in France, and to establish himself at Cannes, and at the same time would be perfectly consistent with an intention not to abandon his Irish domicil and at some time to return and live in Ireland, because it was made apparently to place himself in a more correct position as regards civil and municipal law; and the fact of his having made that declaration would not of itself determine his domicil. After all, it is a question of fact; and the signing of a paper of that sort, without any real intention of carrying it out, and without an intention of establishing a home at Cannes, is not of itself conclusive. But there is another matter in the case more important than that: that is, that in September, 1892, he entered

(1) 7 H. L. Cas. 124.

M. R. 1893.

SPURWAY v. SPURWAY.

into a trading partnership in the most formal way with two persons, one of whom was a Monsieur Hermitte, who appears to have been in business as a manufacturer of perfumery; and by that document a trading arrangement of a very important character was undoubtedly entered into. By it he entered into a partnership for a fixed period of ten years, with every prospect of renewing it, and acquired a business which would engross the greater part of his time and forecast the whole of his career. It is impossible, if this arrangement was genuine that it could be anything other than a selection and adoption of a domicil at Cannes, in France. Suppose he had died after the execution of the partnership deed, and that there were no questions about marriage or the like, or about his wife's property, no jury on the question of the execution of a will or soforth could hesitate to find that he had shown an intention to select France as a domicil in the strongest way. It is not a question of nationality, because he had not done anything to denaturalize himself or to become a naturalized Frenchman, or to shake off his allegiance to his mother country. Therefore, when I found these documents in evidence before me, I felt that unless they were explained in some way, not amounting to mere suspicion, I should have no option but to hold that at the time this writ was issued he was domiciled as a Frenchman. There is a general rule that whoever makes an affidavit in a case is liable to be cross-examined upon it, and if he does not attend for cross-examination, after due notice, the affidavit may be struck out, and no use can be made of it. This rule I have power to put in force, though I have never done so before under similar circumstances. In a case of the sort where the question is whether a man could properly be served with a writ out of the jurisdiction, it would have been tyrannous to compel the defendants to come here to be cross-examined on their affidavits, if no terms were imposed, with the result that they would then be within the jurisdiction, and so might be served with fresh process. However, I put the plaintiff on terms that no document should be served on the defendants, either coming, remaining, or going away, and that order has been obeyed. Of course, if it had not been obeyed, such

process would have been taken off the files as a gross contempt. However, Mr. Spurway has attended for cross-examination, and so has Mr. O'Donoghue.

Mr. Spurway has been cross-examined minutely about the matters that I have referred to, with the view of showing that they were mere shams and contrivances, and that he had no real intention of entering into or carrying on a partnership business, or of adopting a domicil in France. Without going into the merits of the case, which have not been gone into, and which I decline to go into, I am bound to say that Mr. Spurway has given his evidence fairly and clearly, and did not shrink from any of the questions, and I saw nothing in his manner or demeanour to make me think that he was not telling the truth; and the same remarks apply to Mr. O'Donoghue.

What he has sworn in the matter is this—that, until the quarrel arose between him and his wife, he intended going into the medical profession in France; but the disputes having been made public, rendered it impossible for him to hope to succeed in his profession at Cannes, and that then after his marriage, for the first time, he abandoned the intention of settling as a medical man. That he followed his wife to Jersey, she having left him to go to Jersey not with the intention of separating from him, but under an arrangement that he should follow her there. That he did follow her in a couple of months, and that she refused to see him. It appears that in the meantime there had been some angry correspondence between the parties, and in Jersey she consulted legal advisers, and Mr. Hawkesworth, a solicitor, wrote, saying that she would only communicate with him through the medium and channels of the law, and so they were completely at arms' length.

Afterwards he came to this country, and paid a transient visit to his father, probably to talk over the situation and his affairs generally, and whilst in Ireland he concluded the partnership arrangement, which was the subject of the deed of the 20th September, 1892, as he admittedly signed the power of attorney (authorising his uncle to execute the deed for him) while at Castlelost. The consideration in the deed, as far as he is concerned, is stated as being 20,000 francs, equivalent to about £800;

M. R. 1893. SPURWAY *v.* SPURWAY.

and if I had found that this sum had not been paid, or that it was a mere colour, I should have no hesitation in saying that this transaction would not indicate any intention of residing in France, and should hold that it was entered into with the view which has been suggested, viz. with the intention of escaping the tribunals of this country, and such a circumstance would have furnished me with abundant reasons for holding that it was not only not a genuine transaction, but that the real intention was to retain his former domicil. But what are the facts? He did pay that 20,000 francs. He admits that it was paid entirely out of the money that was his wife's.

Well, Monsieur Hermitte got the money into the trade, which was that of a manufacturing perfumer. And what has Mr. Spurway done since? He has, day by day, if he has told the truth, attended to the business, going there at six o'clock in the morning, and leaving for the usual interval in the middle of the day; returning; and remaining till six or seven at night. He has produced, at any rate, one of the books, which is not in evidence, but which is offered to show that his attendance there was really of a genuine character; and these facts, as as far they were capable of corroboration, were corroborated by Mr. O'Donoghue.

The result has been not only not to throw any doubt on this transaction, but to remove the doubts I previously had as to the genuineness of it; and unless I am not to believe one word this man swears, I must come to the conclusion that he is not domiciled within the jurisdiction, and if not, I am wholly unable to see that the case comes within any of the other clauses. It is said by Mr. Meredith that there is a bill of exchange for 30,000 francs outstanding, and that an injunction is sought to restrain the defendants suing on it within the jurisdiction. Now, this is a French bill of exchange, couched in the French language (we had a copy of it here); it was drawn in France; it sounds in francs and not in pounds sterling; it is negotiable in France and among persons living in France, if negotiable at all. Of course it is not inconceivable that, in the peregrinations of a negotiable instrument, it may possibly make its way to Castlelost or some other place else within the jurisdiction; but it never was *domiciled* in this country; and it would be straining the law very

much to say because it is possible or conceivable that a French coin might get over to Ireland, that therefore when an action is brought to restrain something being done within the jurisdiction of the Court, a circumstance like that would be sufficient to give jurisdiction. Then there is another sub-section under which it is said that this order can be sustained, where the case is founded on alleged breach within the jurisdiction of any contract which, "wherever made, according to the terms thereof, ought to be performed within the jurisdiction, unless the defendant is domiciled or ordinarily resident in England or Scotland."

So far as the performance of the alleged contract is concerned, it was a contract to give back money which has got wrongfully into the hands of the defendants. But that would not be a matter within the jurisdiction at all; it is entirely out of it, and the acts complained of are out of the jurisdiction. There is not a single thing to show why the jurisdiction of an Irish Court is resorted to; and it is openly avowed that the action would have been brought in the English Courts only for the circumstance that the man's original domicil was Ireland.

On all grounds I am of opinion that the order must be discharged.

R. W. L.

Appeal. 1893. Oct. 26, 27.

The plaintiff appealed to the Court of Appeal (1).

Meredith, Q.C., and *Samuels*, for the appellant.

The arguments were the same as those reported in the Court below.

Matheson and *Blood*, for the respondents, were not called upon.

(1) Before WALKER, C., SIR P. O'BRIEN, C.J., and FITZ GIBBON, L.J.

Appeal.
1893.
SPURWAY v. SPURWAY.
Oct. 27.

WALKER, C. :—

We do not think it necessary to call upon the respondents' counsel.

The case has been very ably argued on behalf of the appellant, who is desirous of having the action tried in Ireland. I can quite understand the desirability, from the plaintiff's point of view, of having this action tried in an Irish *forum*, if this case would be more favourably tried here for her, by attaching to it all the consequences which would follow from our holding that the defendants had an Irish domicil; but this Court must not, unless the facts warrant it, lend its aid to the plaintiff's endeavour to obtain a more favourable decision by imputing a domicil in this country to the defendants, or either of them.

Without going deeply into the merits of the case, it is enough for me to say that they appear to afford an appropriate subject-matter for judicial investigation somewhere, but the question for us to determine is whether Ireland is the lawful *forum* for this investigation.

Three grounds have been relied upon as reasons for allowing the service of this writ out of the jurisdiction. First, we have been asked to hold that the case comes within clause (*e*) of Order XI., Rule 1. That clause says that the writ of summons in an action may be allowed to be served out of the jurisdiction when "the action is founded on any breach, or alleged breach, within the jurisdiction of any contract wherever made, which, according to the terms thereof, ought to be performed within the jurisdiction, unless the defendant is domiciled, or ordinarily resident in England or Scotland." In the present case there is no contract before us, except the verbal one alleged by the plaintiff, and it cannot be said, as a legal incident, that it has been broken, or is in such terms that it ought to be performed in Ireland. The same remark shows that the plaintiff cannot rely upon clause (*g*), to which we have been referred as the second ground of the plaintiff's contention. This clause says that the Court may allow service of the writ out of the jurisdiction when "any injunction is sought as to anything to be done within the jurisdiction." In the absence of a contract to be performed by the defendants within the jurisdiction, I can see nothing to be enforced by an injunction.

The plaintiff is accordingly driven to rely upon the third position which counsel have taken up. They ask us to hold that the case comes within clause (*c*), and to say that the relief claimed by the plaintiff is sought against persons domiciled within the jurisdiction of this Court. It is on this clause that the question argued before us really turns.

Domicil is a question of fact. There is no doubt about the law. Once a man's domicil—be it domicil of origin or domicil of choice—is established in England or Ireland, a new domicil will not be imputed to him except on the clearest evidence of an intention to change his old domicil. The evidence from which the Court will infer a change of domicil must not be consistent with an intention to retain the old one, and the acts which go to prove the intention to change must not be fraudulent or misleading. It appears to me, however, that the evidence requisite to prove a change of domicil may vary enormously in different cases. The law imputes to every man until he attains the age of twenty-one the domicil of his father. This is his domicil of origin, and until he reaches the age of twenty-one he can do nothing which will operate to give him a different domicil. But if during a man's minority we find in his conduct evidence conflicting with the supposition that he intends to retain his domicil of origin—acts and declarations not in harmony with such an intention—then I think, upon his attaining age, the Court would require less evidence in order to be convinced that his intention was not to stereotype his domicil of origin, but have one in accordance with his declared conduct.

Now let us take the history of the life of the younger defendant. He was born in 1868, at Dundalk; he lived there for five years; then he went with his father to England, where he remained till he was fifteen. At this age he was sent to France, to his uncle, the elder defendant, who henceforward stood to him almost *in loco parentis*. Spurway lived at Cannes with his uncle down to 1887, when he came back to England to study pharmacy at Birmingham. About this time his father seems to have returned to Ireland and to have purchased a residence at Castlelost in the county Westmeath, apparently with a view of settling there. It cannot be disputed that the defendant's father thus

Appeal. 1893. SPURWAY v. SPURWAY. Walker, C.

acquired an Irish domicil. Young Spurway pursued his studies at Birmingham for about three years; and while there, in 1889, he attained his age of twenty-one years. At this date we must, for the purpose of the case, impute to him the domicil of his father, that is a domicil in Ireland. While at Birmingham he paid intermittent visits to his father at Castlelost. But I think on the evidence that all this time his home was really at Cannes, and he was there, at all events, in 1892, when fortunately or unfortunately he met the plaintiff. Up to this time, however, it is admitted that he had done nothing to legally divest himself of his Irish domicil.

Almost immediately after they became acquainted the plaintiff and the defendant Spurway were married. As might be expected the rapid courtship ended in a speedy change of feeling. Husband and wife became estranged; and the plaintiff now charges the defendants with having obtained possession of her property under circumstances which, if true, fall little short of a conspiracy. Unable to recover her property the plaintiff withdrew to Jersey. Her husband followed her; he stopped about a fortnight in Jersey, and while there heard in effect from his wife's solicitor that she would take proceedings against him. He then came to Ireland: this was in September, 1892. He originally intended (he says) to adopt the medical profession, and, when qualified, to practice at Cannes. His studying pharmacy in Birmingham was probably undertaken as part of his course of training. He says, however, that the embarrassing scandal which arose on his wife's desertion of him compelled him to alter this intention, and that he thereupon formed the idea of adopting a mercantile life. At this conjuncture, beyond doubt, he proceeded to declare his French domicil.

Before we say that this step was unreal, let us see what connection he had at this date with Ireland. True his father lived here, and the defendant had been born here; but he left this country with his father in early childhood; he was practically educated by his uncle abroad; he came back to Birmingham only for his studies; he paid a few short visits to his father when the latter came back to live in Ireland. But all this while the defendant's real home was in Cannes, where his uncle lived, and where he meant to practice his profession.

I admit that it seems probable that his motive for so hurriedly declaring that he had elected a foreign domicil was to evade the threatened proceedings regarding his wife's property. But if this be so the steps he took to declare that domicil were all the more real: for they were taken with the view of furnishing conclusive evidence that before the action could be brought in Ireland he had formed the intention to fix his domicil in France. But whatever his motives may have been he declares his domicil in France, and executes the partnership deed. It was a real deed; its subject-matter is a real business; there can be no question as to the *bona fides* of the defendant's partner; real money was put into the business by the defendant—I say nothing as to whose this money was—but the partnership was to last ten years, and the defendant cannot retire from it except at a sacrifice. In my opinion it is a real *bona fide* deed, and by no means an unnatural transaction for the defendant to join in at the time; for it shows a clear intention on his part to settle himself at Cannes. The deed was executed while Spurway was still in Ireland, but immediately after its execution he proceeded to Cannes, and settled himself there. He then, on October 10, 1892, formally declared that he had estalished his residence at Cannes, and obtained a certificate of identity from the authorities so as to acquire civil rights.

From all these circumstances I have come to the conclusion that we must regard the defendant Spurway as having or having acquired a domicil in France before and when the writ was issued in this action.

The defendant O'Donoghue has admittedly less connection with this country. His house is in Cannes, whither he went in 1876, and where he has resided ever since. At Cannes he carries on the profession of teacher of languages. He seems to be a well-known resident there, having had many distinguished and illustrious pupils. I have no doubt whatever that he has acquired a French domicil. There is no evidence at all that could induce me to believe that he had not long ago given up his original domicil in this country.

There is no doubt, as I have said, matter in dispute between the parties, which I should like to see investigated. But the only question for us is to see if we have jurisdiction to compel the

Appeal. 1893. SPURWAY v. SPURWAY. Walker, C.

defendants to submit to have their rights ascertained in an Irish *forum*. To base this jurisdiction we should have to impute to them an Irish domicil. There is, as I have said, no evidence on which we can impute such a domicil to O'Donoghue; and even if we were to yield (which we do not) to Mr. Meredith's contention, and hold that Spurway has still an imputed Irish domicil, yet, looking to the fact that O'Donoghue, who has undoubtedly a foreign domicil, is a necessary party to the action, there is strong grounds for contending that this country does not afford a suitable *forum* for its trial. Indeed, if one considers the subject-matter of the action, not one sixpence of property involved ever having been in this country, neither plaintiff nor defendants being resident here, it seems to me that Ireland *prima facie* is as unnatural a place for the proposed investigation as can well be conceived.

I regret very much if it should turn out that the plaintiff has no other *forum* in which she can have a judicial determination upon her rights. I do not think that is so, but in any event this Court cannot stretch its jurisdiction in order to avoid the hardship which would follow from acting on the legal rights of the parties as we find them.

SIR PETER O'BRIEN, C.J.:—

I concur. I do not think there is any doubt in the case. It is quite plain O'Donoghue has a French domicil. The only possible question is whether this young and, I suppose, attractive gentleman, who has been joined with him as a co-defendant, can be thought to still retain an Irish domicil. I think that the defendant Spurway should have imputed to him an Irish domicil, but for the partnership deed. But on the effect of that deed I rest my judgment. I think it affords clear evidence that this defendant has settled in Cannes, using the word "settled" in the sense in which Lord Westbury uses it in *Bell* v. *Kennedy* (1), and has thus made France his domicil of choice. The Master of the Rolls, who heard these two gentlemen cross-examined, was of opinion that this deed represented a genuine and real transaction, and that it related to a *bona fide* partnership. On reading the

(1) L. R. 1 H. L. (Sc.) 307.

evidence, I come to the same conclusion. Once the deed of partnership is admitted to be genuine it affords cogent evidence of the defendant's intention to settle at Cannes, and to make that place his domicil, for by its terms it is provided that the partnership between the defendant and Hermitte is to last for ten years, and that the partnership business is to be carried on by the defendant at Cannes. I am, therefore, of opinion that the defendant Spurway has made Cannes his domicil of choice, and, accordingly, I am unable to find that either of the defendants has a domicil in this country.

For this reason, in my opinion, the judgment appealed from must be affirmed. At the same time, I should be sorry if our decision were to preclude the plaintiff from having her rights judicially ascertained in some *forum*, for I agree with the Lord Chancellor in thinking that the matters alleged against the defendants form a proper subject for legal investigation.

FITZ GIBBON, L.J. :—

I concur. O'Donoghue has a foreign domicil, and I am of opinion that Spurway also has acquired a foreign domicil. The partnership deed supplies the principal but not the only evidence to establish this. Everything goes to show that the young man's connexion with Ireland was of the most casual sort. His father's domicil does not appear to have been permanently Irish. True, the father was residing in Ireland when the defendant was born, but in the course of his employment as a Civil Servant he afterwards removed to England, taking the defendant with him, and it was only on retiring from the Civil Service that the elder Spurway acquired an Irish domicil, by purchasing and settling at Castlelost. Up to this date the defendant, who was then twenty years of age, had been resident and domiciled out of Ireland, except during the first five years of his life. Any subsequent connexion he had with this country was confined to a few visits which he paid to his father at Castlelost, in the intervals of his medical studies at Birmingham. His uncle brought him up. Cannes was his real home, and though, of course, on his coming of age, his father's then Irish domicil was by law imputed to him as an adult, still it is quite plain that his connexion with Ireland resulted from a series

Appeal. 1893. SPURWAY *v.* SPURWAY. Fitz Gibbon, L. J

of accidents. I think the weakness of the foundation of his Irish domicil is to be taken into account in deciding whether, as matter of fact, he still has it. Under all the circumstances of the case, I think he has lost this Irish domicil, and has acquired a domicil in France.

But even if I were not of this opinion, and if I thought that the Irish Court had jurisdiction in the matter, I am by no means prepared to say that it is a jurisdiction which ought to be exercised, for the purpose of bringing to trial in this country a number of people, none of whom are really Irish, and investigating here acts and rights with which Ireland has no concern, especially as it is alleged (though I am not sure that it is so) that the rights of the parties might be altered by changing the place of trial.

Solicitor for the plaintiff: *Weldon Molony.*
Solicitors for the defendants: *W. G. Bradley & Son.*

G. Y. D.

Monroe, J. 1894. April 16, 20.

IN THE MATTER OF THE ESTATE OF ANDREW J. O'CONNOR, OWNER; JOHN FRANCIS M'NAMARA, PETITIONER.

Judgment mortgage—Registration—Affidavit—Description of lands.

An affidavit to register a judgment as a mortgage stated that the judgment debtor was seised, &c., of the lands of "L." in the barony of B. and county of G. There were, in fact, two townlands in the barony of B. called "L." East and "L." West, in the latter of which the judgment debtor's property was situated; but there was no townland called or known as "L.", nor was there any evidence to show that there was any denomination of land known as "L." simply:

***Held*, that the registration was defective.**

MOTION on behalf of Daniel Purcell, an incumbrancer having carriage of the proceedings, for an order upon the receiver to pay interest according to priorities. In the proposed schedule John F. M'Namara and Michael Cartan O'Meara, incumbrancers on foot of

judgment mortgages, registered on the 23rd May, 1893, and 6th July, 1893, were placed in priority to Catherine Curran, an incumbrancer, on foot of a judgment for £143 1*s.* 2*d.*, registered as a mortgage on the 28th November, 1890. When the motion came on to be heard notices were served by Messrs. M'Namara and O'Meara, claiming to retain their priority, on the ground of the defectiveness of the affidavit to register the judgment mortgage of the 28th November, 1890. This affidavit *inter alia* stated that "the said Andrew John O'Connor, the said defendant," the judgment debtor and the owner in the matter, "is at the time of swearing this affidavit seised or possessed at law or in equity, or has disposing power, which he may, without the assent of any other person, exercise for his own benefit over certain lands, tenements, hereditaments, and premises hereinafter mentioned, that is to say, Lavally, otherwise Lavallay, in the barony of Ballymoe, and county of Galway."

It was proved by affidavit, and in fact admitted, that there were two townlands in the barony of Ballymoe, known respectively as Lavally East and Lavally West, the latter being the townland in which the lands over which the receiver was appointed in the matter were situate; but there was no townland simply called Lavally or Lavallay.

D. F. Browne, for the party having carriage.

F. Fleming, for Mr. M'Namara; and *Miles Kehoe*, for Mr. O'Meara:—

The registration is defective as regards the lands of Lavally West. The affidavit does not state whether the lands intended to be affected are Lavally East or Lavally West, and there is no denomination of land actually known as Lavally. In *Harris* v. *O'Loghlen* (1) the lands were described as being situate in the barony of Bunratty. There were baronies of Upper Bunratty and Lower Bunratty, but no barony of Bunratty; and the registration was held bad. Sir Edward Sullivan, M.R., says, at p. 521:—"The very uncertainty of the description, which throws on the man who is examining the register the task of inquiring what lands

(1) Ir. R. 5 Eq. 514.

Monroe, J. 1894. *In re* O'Connor's Estate.

are affected by the judgment, and which does not enable him to see what these lands are, and in what barony situate, without further inquiry, is enough, in my opinion, to render the registration useless and invalid." These observations apply directly to the present case. Both Lavally East and Lavally West are in the barony of Ballymoe, so that an inspection of the registry would not disclose which of the two townlands was referred to. In *In re the Bagnalstown and Wexford Railway Co.; Ex parte Bagnall* (1), referred to in Madden on Registration, p. 161, the description was "lands in the townland of Kilcarney." This was held to charge any lands of the Company in that townland, the Court considering that the affidavit, though inconveniently vague, was consistent with the Act of Parliament. The Lord Chancellor treats the townland as of equal importance with the barony and county.

Oulton, for Daniel Curran, the personal representative of Catherine Curran :—

The Judgment Mortgage Act (13 & 14 Vict. c. 29), section 6, expressly requires the barony to be specified in the affidavit of registry; but the Act does not require a similar statement of the townland. As to the description of the lands, irrespective of the statutory requirements, all that is necessary is to describe them with the same certainty that would be sufficient in a deed. Can it be doubted that a mortgage in the same terms would be effectual to charge the lands? In the *Bagnalstown Case* (1) the description was of the vaguest kind. There is no foundation in the Act of Parliament for the statement attributed to the Lord Chancellor that the statute required the townland to be mentioned.

April 20. Monroe, J. :—

[Having dealt with several other objections his Lordship said :—]

The last matter to be dealt with is as to whether the judgment registered by Catherine Curran against the lands of "Lavally" is a valid charge against the lands for sale. It appears there is

(1) 10 Ir. Jur. (N. S.) 253.

no townland of "Lavally." There are in the county of Galway two townlands, one known as Lavally East, and the other known as Lavally West. I have nothing whatever to show me that there is any denomination of land known as "Lavally" simply. I shall allow Daniel Curran to file additional affidavits within one week, to show me that there is a description of lands known as Lavally; but if no such affidavit be filed, I must hold the registration to be defective. In the *Bagnalstown Case*(1) there was a good deal of discussion as to whether it was sufficient to describe the lands as being in a certain townland, the name of which was correctly given. The Court held that where the townland is given the description is sufficiently definite. But they threw out that if the description given be wider than the townland, the registration should be held defective. If the term "Lavally" were applied indifferently to "Lavally East" and "Lavally West," the description here would embrace the two townlands.

[No affidavit was filed, and the matter was not again mentioned.]

Solicitors for the petitioner (J. F. M'Namara): *Blake & Kenny.*
Solicitor for M. C. O'Meara: *M. C. O'Meara in person.*
Solicitors for Daniel Curran: *E. & G. Stapleton.*
Solicitor having carriage: *Daniel Purcell.*

W. G.

(1) 10 Ir. Jur. (N. S.) 253.

Monroe, J.
1894.

KEENAHAN *v.* GANNON.

April 24, 30. *County Court appeal—Practice—Objection to decree not raised by cross-appeal.*

Where a party in an equity civil-bill action appeals from so much only of an order of the County Court as is unfavourable to himself, his adversary cannot, in the absence of a cross-appeal, question the validity of the order.

Where a plaintiff in an equity civil-bill for specific performance obtained a decree, but appealed from so much of it as charged him with interest on purchase-money, and refused him damages:—

Held, that it was not competent for the defendant, who had not appealed, to impeach the decree on grounds which would have afforded a defence in the Court below.

CIVIL-BILL APPEAL by the plaintiff, in an action for specific performance of an agreement for the sale of land, from so much of the decree of His Honor Judge Curran as charged the plaintiff with interest on the amount of his purchase-money, and refused him damages.

Denning, for the plaintiff (appellant):—

There were no grounds for charging us with interest. [Counsel argued on the evidence that the plaintiff was entitled to damages for being kept out of possession.]

Clancy, for the defendant (respondent):—

Though the plaintiff has only appealed upon two points, the whole case is to be re-heard, and it is open to the defendant to show by evidence, as he proposes to do, that he has a complete defence to the action on the merits, and that the decree for specific performance ought never to have been made: County Officers and Courts Act, 1877, s. 43—a provision similar to the section giving an appeal to the Judge of Assize; County Court Appeals Act, 1889, s. 3. At Assizes there is always a complete re-hearing. The County Court Judge has power to re-hear within three years: County Officers and Courts Act, 1877, s. 42.

[Subject to the plaintiff's objection, the defendant and other witnesses on his behalf were examined, the Judge reserving the right of ultimately rejecting all evidence, except upon the points mentioned in the plaintiff's notice of appeal, if, after argument, he arrived at the conclusion that the defendant was not at liberty to raise any other questions. The nature of the evidence will be found stated in the judgment.]

Denning, for the plaintiff :—

There is nothing in the 43rd section to give any sanction to the course which the defendant asks the Court to adopt. The regulations as to appeals are contained in Order XX. of the County Court Orders of 1890, Rules 2-5. Points not mentioned in the notice of appeal cannot be argued : *Sweeny* v. *Gallagher* (1). The notice of appeal to the Judge of Assize, under 52 & 53 Vict. c. 48, s. 3, is not required to state the grounds of appeal : see Form No. 1, Carleton's County Courts, by Dixon, p. 1150.

Clancy, in reply :—

The effect of *Sweeny* v. *Gallagher* (1) is that the appellant is confined to the grounds stated ; but once he appeals the whole case is open *quoad* the respondent.

MONROE, J. :—

April 30.

The equity civil bill in this case was filed by the plaintiff, for the purpose of obtaining specific performance of an agreement for the sale of a farm.

It appears that the defendant was in this country at the time when the suit was commenced, but was obliged to leave the country before the hearing, and at the hearing he was represented by his solicitor. A decree was made practically in the terms of the civil bill ; and, the plaintiff having also claimed damages for breach of the contract, the County Court Judge decided that no damages were to be given, and also decided that the plaintiff should pay interest on the amount of the purchase-money. The defendant did not appeal against that decree. He was represented by a solicitor ; and the solicitor could have applied to the County Court Judge, or to this Court, or to the Judge of Assize, for such

(1) 22 Ir. L. T. R. 82.

Monroe, J. 1894.

KEENAHAN v. GANNON.

adjournment of the appeal as might be necessary, in the event of the defendant not being able to reach this country in time.

The plaintiff has appealed against so much of the decree as declared that he was not entitled to damages, and that he was to pay interest "as aforesaid." The County Court Judge explains that he did not intend to charge the plaintiff with interest, and that these words "with interest as aforesaid" crept into the decree by mistake.

The matter came before me on the appeal, which had been taken by the plaintiff. On looking at the Judge's notes I found no materials to enable me to arrive at a decision on the question of damages, and no reason at all to show that the plaintiff should pay interest on the purchase-money. But inasmuch as there was nothing before me to show why damages should be given, I remitted the case to the County Court Judge, to report the evidence on the question whether the plaintiff was entitled to damages, and to what amount. Leave was also given to file affidavits.

The County Court Judge states that he was not aware that any appeal would be taken, or at least that there would be an appeal to this Court; but that if an appeal were taken it would be to the Judge of Assize, where the case would be re-heard, and evidence given, and therefore he did not take any notes of the evidence.

Mr. Clancy, on the adjourned hearing, contended that, as the plaintiff had appealed, I was at liberty to consider, without a cross-appeal, whether or not there were grounds for so much of the decree as directed specific performance. His client made an affidavit which shows that there may have been ample grounds for such a contention—that he directed the auctioneer to sell by auction; that there was no auction; that after the persons who attended the sale dispersed he (the defendant) went to a public-house and got drunk; that the auctioneer alleged afterwards that he had sold the farm privately for £50; that the agreement was signed by the auctioneer after the defendant had gone away; and that, in fact, the whole thing was done behind his back. That was the nature of the case which Mr. Clancy asked me to investigate, although there was no appeal by the defendant.

Now, the jurisdiction of the Court as to appeals is very specific. The 43rd section of the Act of 1877 (40 & 41 Vict. c. 56) provides that any party dissatisfied with a decree, dismiss, order, or direction, may, within two months after the same shall have been made, appeal therefrom to the Lord Chancellor, and that such party shall, within one month after such decree, &c., give notice of appeal to the other party or his solicitor, and deposit with the Clerk of the Peace £10 as security for costs; and the Lord Chancellor may, upon such appeal, make such decree or order as he shall think proper, or may remit the suit to the County Court Judge, with such directions or declarations as to the Lord Chancellor shall seem proper.

The procedure in reference to appeals is contained in the County Court Rules. Rule 129 (1) is as follows: "In every equity suit the Judge shall, at the hearing, make a note of any question of law raised, and of such portion of the evidence given at the hearing as he shall consider material, and of his decision of such question of law (if any), and of the suit or matter, and such note shall be called the 'Judge's note'; and he shall, at the request of any of the parties in such suit or matters requiring the same for the purpose of the appeal, furnish a copy of such note, or of such part thereof as may be necessary for the purpose of such appeal, such copy to be made by the Clerk of the Peace or the Registrar at the expense of such party, and to be signed by the Judge, and the copy so signed shall be used and received on the hearing of the appeal." Rule 130:—"All appeals under the equity jurisdiction shall be made by motion." Notice of such motion is to be served on all parties within one calendar month after the decree or dismiss appealed against; and copies are to be lodged with the Clerk of the Peace and the proper officer of the Chancery Division within fourteen clear days from the last of the services of the notice on the parties. Rule 131:—"The notice of motion is to state the date and general nature of the order appealed from, the grounds of appeal, and the documents or other evidence upon which it will be founded." Rule 135:—"No evidence shall be given or documents used on the hearing of the appeal, except the 'Judge's note,' the 'Registrar's note,' the documents therein referred to, and the other documents transmitted by the Clerk of

(1) Order XX. (1890), R. 1, *et seq.*

Monroe, J. 1894. KEENAHAN v. GANNON.

the Peace" (Rule 134). The Judge of appeal may, however, direct evidence to be given by affidavit or otherwise of any fact or matter on which he may require further evidence, or may remit to the County Court Judge the "note" for addition, explanation, or amendment.

Now, under these circumstances, it is perfectly manifest that I have no jurisdiction to deal with any matters except those appealed against. If I decided that there was to be no specific performance, and allowed the defendant to go into entirely different questions, without giving security, as directed, and as to which the County Court Judge had not reported the evidence, unless I were to direct the Judge to report all the evidence that had been given, great injustice might be done to the plaintiff. If there has been any miscarriage, the defendant can, within three years, obtain permission of the County Court Judge to have the case re-heard. But that is a jurisdiction vested in the County Court Judge, and not in me. I must therefore decline to interfere with so much of the decree as directs specific performance.

Then as to the plaintiff's appeal. The plaintiff is clearly not bound to pay interest on the money which he was always ready to pay. As to the question of damages [His Lordship, after referring to the evidence given by affidavit stated that as there was no reliable evidence of any damage sustained by the plaintiff, he would in other respects affirm the decree without costs, on the defendant undertaking to pay the half-year's head-rent, falling due on the 1st of May].

Mr. Clancy, counsel for the defendant, stated in the course of the argument that, on the hearing before the Judges of Assize in equity civil-bill cases, the practice is for the Judge to re-hear the entire case, to pronounce such decree or dismiss as, in his opinion, ought to have been pronounced by the County Court Judge, and thus often to reverse the part of the decree given against a party who had not appealed. I know of no such practice; and I believe it will be found to be exactly the reverse. Parties come to the Appeal Court to have discussed and decided only such matters as are appealed against.

Solicitors for the plaintiff: *Hoey & Denning.*
Solicitor for the defendant: *Friery.*

W. G.

PIRRIE *v.* YORK-STREET FLAX SPINNING CO. (1).

Appeal. 1894.

Feb. 6, 7, 8, 9, 12, 13, 14, 15, 16. April 30.

Patent—Validity—Novelty—Utility—Application of a known appliance to an analogous use—Application of an old contrivance to a new purpose—Ingenuity—Anticipation—Provisional and complete specifications—Variance—Evidence.

The plaintiff had patented an improvement in "wet spinning for flax and like yarns," which consisted in the use, as a pirn, of a thin flexible paper tube placed upon a hard core or base, upon which, in the process of spinning, the yarn was wound. This tube, with its base, formed a composite pirn or carrier, which, with the yarn wound upon it, was removed from the spinning frame, and taken to the drying-room. The result of the process of drying, necessary in wet spinning, was to detach the inner core from the paper tube while the yarn retained its contact with and adhered to the paper tube, and remained "in cop" as spun on the tube. The inner core was then taken out of the tube and returned for further use to the spinning frame, while the cop, *i.e.* the tube with the yarn as spun on it was sent to the weaver ready for use in the shuttle.

In wet spinning the unspun fibre is passed through a trough of warm water, in which it is saturated before reaching the rollers. The object of this treatment is by maceration to prepare the fibre for the process of drawing by the rollers, and also to remove as much as possible of the natural gum. After passing through the rollers the fibre is spun on the pirn or bobbin in a saturated condition, and is in this condition removed to a drying-room, where it is artificially dried.

Flax yarns, and yarns of similar fibres have qualities that require, for the purposes of spinning, the treatment of saturation by water and maceration, which forms part of the process of wet spinning. The effect of saturation, followed by drying, combined with the inelastic character of the yarns which require to be wet spun, creates a difficulty peculiar to wet spinning. This difficulty consists in the yarn, when dry, becoming slack on the base or carrier upon which it has been spun, and, after the yarn has been dried, necessitates either re-winding or some process for tightening the yarn upon its base or carrier, or some other contrivance for retaining the yarn thereon.

Previously to the plaintiff's patent, pirns or carriers of various materials and construction had been designed, and various processes adopted, for the purpose of meeting this difficulty in wet spinning, and producing the cop or spun yarn

(2) Before SIR PETER O'BRIEN, C.J., and FITZ GIBBON and BARRY, L.JJ.

Appeal. 1894.

PIRRIE v. YORK-ST. SPINNING CO.

in condition ready for use by the weaver on the base or carrier upon which it had been spun; but prior to the plaintiff's patent no one had ever used thin paper tubes in wet spinning, or for the purpose of obviating the above difficulty.

The plaintiff's patent was designed to meet this difficulty, and was more successful than any previous contrivance or process in efficiently and cheaply obviating this difficulty, and in producing the cop of yarn in a condition ready for use by the weaver upon the pirn or carrier on which it had been spun.

The above difficulty did not occur in dry spinning. Cotton worsted and yarns of like fibre require dry spinning. The only process to which these yarns, or the threads formed from them, are subjected, in which water is used is that known as "doubling." This process consists in winding together two or more threads already spun, and the threads are only damped to remove roughness and prevent kinking, and are never wet to a degree which requires artificial drying, and no shrinkage or expansion of the yarn upon its carrier takes place.

For many years previously to the plaintiff's patent thin paper tubes of various sizes had been used in the spinning and doubling of cotton, worsted, and yarns of similar fibre, and sometimes in combination with a rigid core or base, separable from the spindle.

The object of this use of such tubes was simply to provide a cheap base for the winding of the fibre or to keep open the hole in the centre of the cop, or to facilitate the "doffing" or removal of the cop from the spinning frame.

The use of such tubes had been the subject of several patents anterior to that of the plaintiff, relating to spinning and doubling, and in some of these patents the paper tube was used in combination with a rigid base separable from the spindle. But all these patents were, by the terms of their specifications, or by the method thereby prescribed of using the paper tube, expressly or by implication, confined to dry spinning and doubling, and none of them disclosed how these thin paper tubes could be used in wet spinning or was directed to the peculiar difficulty occurring in wet spinning; and as compared with each of these previous patents the plaintiff's method of using the paper tube was distinct in purpose and not analogous in mode.

In all processes and patents previous to the plaintiff's patent, where a rigid base separable from the spinning frame was used in connexion with these paper tubes, such base either formed portion of, or was an adjunct of, the spindle, and the plaintiff was the first person who used such a base as part of a composite pirn or carrier, and was the first person who used the process of drying as an agency to separate the inner core of this composite pirn from the outer tube.

Since the plaintiff's patent the use of thin paper tubes by his process had become general and increasing in the wet spinning of flax and like fibres, and in the trade of wet spinning these tubes were driving out of the market the other pirns or carriers.

Under his patent the plaintiff had granted licenses for the use in wet

spinning of thin paper tubes according to his process, and was in receipt, by way of royalty under these licenses, of payments of large amount :—

Held (affirming the Vice-Chancellor), that the plaintiff's process was novel, useful, and involved a sufficient exercise of ingenuity to make it a good subject-matter for a patent, and that the plaintiff's patent was valid and had not been anticipated, and that none of the previous patents or processes in which thin paper tubes were used disclosed the practicability or method of using such tubes in wet spinning, or the practicability or method of so using them for the purpose of obviating the difficulty peculiar to wet spinning ; and that none of these patents or processes was directed to meet the same difficulty, or followed the same method, or obtained the same advantages, as the plaintiff's patent.

At the trial of the action before the Vice-Chancellor, L., who was one of the witnesses for the defence, was asked in direct examination—"Did you make a suggestion to any other person at the same time about the introduction of the paper tubes?" E., who was also a witness for the defence, was asked in direct examination—"Prior to September, 1889, had you a conversation with L. in reference to the use of these paper tubes?" Both questions were objected to, and disallowed as irrelevant. No effort was made either to press them at the time or to lay any foundation for repeating them, nor was any undertaking offered to make them evidence in due course. The defendants appealed from the judgment of the Vice-Chancellor. No reference was made to the rejection of the proferred evidence in the notice of appeal, but at the hearing of the appeal the appellants argued that the evidence was improperly rejected :—

Held, that the appellants, having to all appearance at the time submitted to the ruling of the Vice-Chancellor, could not, in the Court of Appeal, be permitted to argue on statements of what they could have proved, but did not offer to prove, that the questions, which were *prima facie* irrelevant, should have been admitted.

APPEAL by the defendants from the order of the Right Hon. the Vice-Chancellor, declaring the plaintiff's patent valid, and granting an injunction restraining the defendants from infringing it. The judgment of the Court below is reported, 31 L. R. Ir. 3.

In addition to the matters given in evidence at the trial, the defendants relied upon a patent obtained in the year 1858 by Messrs. Webb & Craig, as being an anticipation of the plaintiff's invention. The particulars of this patent are given fully by the judgment of Lord Justice Fitz Gibbon.

This patent was not relied upon by the defendants in their particulars of anticipation, or on the hearing of the action before the Vice-Chancellor. The defendants had subsequently discovered

Appeal. 1894. PIRRIE v. YORK-ST. SPINNING CO.

it by searching the Patent Records; and, having applied by motion to the Court of Appeal, were allowed to amend their particulars of anticipation, and rely upon this patent.

The defendants also relied upon the rejection of some evidence offered by them at the trial, the facts relating to which appear fully in the judgments delivered in the Court of Appeal.

The evidence given at the trial appears fully from the judgment of the Vice-Chancellor, already reported (31 L. R. Ir. 3), and the judgment of Lord Justice Fitz Gibbon.

Carson, *Q.C.*, and *Meredith*, *Q.C.* (with them *Bartley*), for the appellants.

White, *Q.C.*, and *Bates* (with them *Kenny*, *Q.C.*), for the respondent.

April 30.

SIR PETER O'BRIEN, C. J. :—

The argument of this case extended over several days, and, by reason of the difficulties involved in its determination, we reserved judgment.

I have arrived, after much hesitation, at a conclusion in the case; but I own my mind is not free from misgiving as to the correctness of that conclusion. Patent cases in this country are few and very far between. In England they form a special branch of practice. The decisions there are innumerable; but they do not (and necessarily so from the nature of the subject-matter) afford us very satisfactory guidance. It has, I think, been truly said that the authorities are necessarily decisions on particular cases, and are useful only in affording some guide to the decision of any particular instance coming under consideration; that each case must be decided on its own merits, and with reference to its own special circumstances. This applies, more or less, to all branches of the law, but is, I think, peculiarly applicable to patent cases.

The main question arising in point of law in the case before us seems to be whether the use of an appliance, which was known in cotton and woollen spinning, and was used therein respectively

for the production of what is known as a "cop," is patentable when applied to flax spinning, for the common object of producing a "cop," but with the particular object and result of obviating a difficulty which did not exist in cotton spinning, but which did exist and produced injurious results in flax spinning. My answer to that question is, that such use of the old appliance is patentable if the new application of the known instrument is a different mode of using it from that which previously obtained, involves the exercise of ingenuity, obviates a special difficulty, and produces a new beneficial result, and if the main operative purpose of the use is to overcome that difficulty, and effect that new beneficial result.

The questions which arise, in point of fact, are—Was the old appliance differently used? Did its different use in a new field involve the exercise of ingenuity? Did the use obviate a special difficulty, and effect a new beneficial result? Was the main operative purpose of the use to overcome that difficulty and obtain that result? These are the questions which present themselves in point of fact; and, in my opinion, if they can be answered in the affirmative, the plaintiff is entitled to judgment in his favour in point of fact and in point of law, so far as relates to what appears to me to be the main controversy in the case. There are other questions to which, of course, I shall have to advert.

Now, what are the facts of this particular case? The Vice-Chancellor has dealt with them at great length. I will refer to so much of them as is necessary to explain the opinion at which I have arrived. It appears that in the spinning of both cotton and wool a certain appliance was used. This consisted of a wooden pirn and outer tube of paper. The wooden pirn was put upon a spindle in the spinning machine, and on the pirn was placed a tube of paper. Upon the paper the cotton or wool, as the case might be, was spun. When spun, the "cop"—consisting of the yarn and paper tube—and the pirn were taken off the spindle. When removed from the spindle the paper tube, with the spun threads upon it, was removed from the pirn, and the paper tube, with the spun threads, forming what was called the "cop," was sent to the shuttle for the purposes of weaving. Sometimes the pirn was not removed from the spindle, but the paper tube, with

Appeal. 1894. PIRRIE v. YORK-ST. SPINNING CO. Sir P. O'Brien, C.J.

the yarn upon it, was taken off the pirn while on the spindle, and was sent on to the weaver. I wish especially to point out that it was quite practicable, in cotton and worsted spinning, to remove the paper tube, with the yarn on it, from the pirn, whether the pirn remained on the spindle or was taken off the spindle; and I desire to emphasise the fact that in cotton and worsted spinning the pirn never parted company with the spindle, for the paper tube, with the yarn on it, was removed, either whilst the pirn was actually on the spindle or in immediate proximity with the spindle, the pirn, when removed off the spindle, being forthwith replaced on the spindle when the paper tube and yarn were removed. Cotton and worsted spinning is a practically dry process, there being no such degree of moisture as to render it difficult to remove the paper tube and yarn from the pirn. There is no likelihood of the paper tube crumpling on the pirn, or in the hand, from the effects of moisture or wet in the process of removal from the pirn. In cotton and worsted spinning the pirn is the constant companion of the spindle. So much for cotton and worsted or dry spinning. I now turn to flax spinning, which is a wet process. In flax spinning, owing to the degree of saturation that is required for the purpose of maceration, the yarn is spun absolutely wet. It was spun, before the plaintiff's discovery, on a wooden pirn, or on something that was rigid, having practically the same qualities as wood. When so spun, the pirn, with the yarn upon it, was taken to the drying-room. The pirn parted company with the spindle, and, with the wet yarn round it, was brought to the drying-room. In the process of drying, which is a process peculiar to flax spinning, a shrinkage took place; the wood shrunk away from the yarn, and the yarn receded from the wood. This caused the "cop" to be slack on the pirn, and this slackness was fraught with injurious results, because when the pirn, with the yarn on it, was brought to the weaver, it did not run off freely and regularly: on the contrary, it became ravelled and tangled and knotted, and caused difficulty in the process of weaving, and loss of time and of material. That this injurious result was the consequence of the slackness, and that the slackness did take place in the process of drying, there can be no doubt. In fact, it is more or less a common case that this mischief did

exist in flax spinning. It was peculiar to wet spinning, and did not exist in the case of cotton and worsted, or dry spinning. It will be seen that slackness, which was so injurious in the case of wet spinning, did not exist in dry spinning. There was no drying process in the latter, as there necessarily was in the former, and accordingly no shrinkage; and it will be seen also that the pirn, which was brought from the spindle to the drying-room in the wet process, never parted company with the spindle in the dry process.

In this state of things Mr. Pirrie cast about to ascertain whether he could discover a remedy for the special difficulty and mischief which were produced by the shrinkage in the wet process. After the expenditure of time, thought, and trouble, and the making of many experiments, he ascertained that if a compound base, viz. a pirn and a soft paper tube, was employed in wet spinning, the difficulty would be obviated. Theretofore soft paper had never been used as a vehicle for spinning and weaving in the wet process. It is on the use of such paper, in conjunction with a wooden pirn, that he rests his claim for a patent.

The plaintiff, at the trial before the Vice-Chancellor, after enumerating the various pirns in use in wet spinning prior to the introduction by him of flexible paper, described the difficulties and mischiefs which existed in previous processes, and the nature and result of his efforts to overcome and obviate these difficulties and mischiefs. He said, "All these failed to prevent the flax getting slack on the pirn. I have seen the various pirns used, and their inconvenience. On all I had observed looseness or slackness of the yarn on the pirn after the drying process. The practical inconvenience of that was that when placed in a shuttle the yarn would come off in a lump, instead of in a single thread, and cause much waste. They (the 'cops') were dried in cages; the wood would shrink away from the outside yarn inwards, and the yarn shrink from the wood. It leaves the pirn as it dries, and becomes loose. In 1888 I knew this difficulty had to be overcome. I made experiments on all previous inventions to see if they could be further improved by effecting greater adhesion. I saw that we would have to get over the shrinking of the carrier on the pirn, and that that was to be done by making it as thin as possible, that paper would be thin

Appeal. 1894. PIRRIE v. YORK-ST. SPINNING CO. Sir P. O'Brien, C.J.

enough for this, and also that, owing to the natural gum in the yarn, when dry the gum would help it to adhere to the paper. I tested the gum in the flax by placing a piece of paper behind the spindles, to catch the gum thrown out by the thread from the spindles, and put another piece of paper on the top of it, and after ten hours took up and dried them, and found them perfectly adhering. My experience of paper was thus satisfactory. In the use of thin paper I found the yarn embedded itself more or less, according to the tension. The paper tube presents a rougher surface than the *papier maché* used previously. I found also by my experience that the yarn gummed itself to the paper tube. The layers of yarn adhere together. A wooden pirn is also used with my paper. We call this pirn sometimes a socket. When taken off it"—the whole appliance, as I understand—"is wet, with the paper tube adhering to the socket, and all are dried together, and the wooden pirn then becomes detached by shrinking in, and the yarn is then left adhering to the paper tube, and in that condition is sold to the weaver, and is fit immediately to be put into the shuttle. I have seen my tubes in actual use at the weavers. They act well. They are unquestionably an improvement on the former pirns used."

Now, such is the evidence of the plaintiff, and I think it better, immediately after reading it, and whilst it is fresh in our recollection, to offer some observations upon it. If true, it establishes that a defect of a serious character existed in the previous processes of wet spinning; that those defects have been remedied by his invention; that for the first time, in wet spinning, a compound base was used, namely, a wooden pirn with a soft paper tube on it; and that the discovery of the usefulness, efficaciousness, and qualities of this compound base, required the exercise of thought, the possession and exercise of skill, the making of experiments, and the expenditure of time and trouble. Slackness in the old process is established; the mischiefs produced by slackness are clearly indicated and established; the correction of the slackness by the use of paper is established; and the experiments which resulted in showing that the natural gum of the yarn, when applied to the comparatively rough surface of soft paper, overcame the vice of the former system, namely, slackness, involved,

in my opinion, the exercise of thought, trained intelligence and skill, and also the expenditure of time and trouble, and therefore established, on the part of the plaintiff, merit and ingenuity. By his cleverness, his experiments, and skill, he established that flexible paper was useful in the attaining of a beneficial result, outside the track of the former use of such paper. Such, in my opinion, are the results of the plaintiff's evidence, if not displaced. But has the effect of his evidence been displaced? The existence of slackness, and its injurious consequences in previous processes of wet spinning, seem to me to have been practically admitted. However this may be, the plaintiff is corroborated by many witnesses. I wish especially to refer to the evidence of one witness for the plaintiff, namely, Mr. Thomas Andrews, a well-known gentleman of very leading position in the North of Ireland. He stated "that he was a member of John Andrews & Co., of Comber, Flax and Tow Spinners; that he was a flax spinner since 1864; that he experienced a difficulty from the shrinking of flax yarn in the course of spinning. In 1865 his firm were asked to put yarns on beams or large spools; they did so in that year, and continued it until 1877. The yarn was wound on wet; it then got loose and ravelled, and could not be unwound. He says that his firm gave up the system. The plaintiff's patent would have met their difficulty, if they had had it at the time." This was Mr. Andrew's evidence. He was practically not cross-examined. I confess I attach considerable importance to his evidence, a gentleman of very leading position, of the very highest character, and great experience and skill in the flax spinning trade, and absolutely independent of all parties. He clearly established the vice of the old system, slackness and its mischievous results. Of course Mr. Andrews' opinion is not so conclusive as to the superior efficiency of the thin flexible paper as a carrier; he does not depose to any actual experience of it as such, though he says, looking at the specification, that the plaintiff's patent would have met his difficulty if he had had it at the time. I accept without reservation the statement of his experience as to the defects of the former system, and regard his opinion as valuable as to the efficiency, the adequacy of the paper tubes as carriers. There is, no doubt, a very acute controversy as to the

Appeal. 1894.

PIRRIE v. YORK-ST. SPINNING CO.

Sir P. O'Brien, C.J.

superior efficiency, or perhaps I should say adequacy, of the flexible paper as a carrier, that is to say, whether it has attained the main object sought, whether it possesses the chief merit claimed for it, namely, adhesiveness. I do not understand the word to be used by the plaintiff in the sense of stickiness to a very tenacious degree, but adhesiveness in the sense that there is no material slackness, so that the union between paper and yarn is substantially maintained. Now, as regards this, there is, as I said, an acute controversy; and no doubt the matter is a difficult one; but giving the evidence my best consideration, though I freely admit it is a question on which others might think differently, I have come to the conclusion that adhesiveness, in the sense I have indicated, has been made out to an appreciable extent. My reasons for this conclusion are as follows:—In the first place, the plaintiff, Mr. Pirrie, and Mr. Hamilton, distinctly depose to the greater efficiency, to the adequacy of paper tubes as carriers. No doubt their evidence is encountered by the evidence of the defendants' witnesses, but I think that *a priori* it is probable there would be adhesiveness. The probability is that paper, with its comparatively rough surface, and having regard to its thickness, or rather thinness, would adhere better to the yarn. The gum of the yarn would more readily attract paper than wood, and the wooden pirn, having regard to its thickness, and to the distension and swelling of the wood, which must to a certain extent exist, owing to the saturation that takes places in the wet process, would shrink more from, and be less attracted by the yarn, than would paper, which from its thinness would swell less, if indeed it would swell at all, and which would from the character of its surface, and the quality of its material, be more readily attracted by the yarn. There is greater probability of adhesiveness in the case of a flexible paper tube, which is soft and somewhat rough, than in the case of a hard surface, such as that of the wooden or *papier maché* pirn. In addition to the direct evidence on the point, there is this *a priori* probability in favour of the plaintiff. I turn now to the evidence of Mr. Leathem, one of the principal witnesses for the defence. What he says is important. No doubt he states that there is no difference between the wooden pirn and the flexible paper tube as to the adherence of the yarn, but he adds that the

flexible paper tubes adhere to the coarser kinds fairly well; and while he states that the flexible paper has no greater advantages for the manufacturer, he adds that it may have to the spinner; and when cross-examined he stated that his firm had never used any other pirn more satisfactory than this for coarse yarn.

Now, the Vice-Chancellor saw and heard all these witnesses—a great advantage indeed—and he saw, as we did, the respective processes performed, and he came to the conclusion that adhesiveness, in the sense of adequacy for the function of carriage, was established. For my own part, I think that some of the defendants' witnesses addressed themselves rather to the degree of adhesiveness than to the adequacy of the paper tube to bear the yarn and not part company with it till it came off freely and regularly in the shuttle. But however that may be, it strikes me as strange that the use of these paper tubes would have, by reason of greater economy alone, become so suddenly very general, that they would have been used to such a very great extent, unless they were adequate as carriers. Different views may be taken by different persons on this question; but forming, as a juror, the best opinion I can on this matter of fact, I think it has been established that these paper tubes have a greater degree of efficiency as vehicles in flax spinning than that which had been previously attained. The vehicles formerly employed were clearly inadequate; the paper tubes are fairly adequate.

I now come to a consideration in detail of the grounds upon which the plaintiff's patent has been challenged. It is admitted that there has been an infringement, if the patent be valid. The main grounds of impeachment are—(1), that the object sought—namely, adhesiveness—has not been attained; (2) want of novelty; (3) want of subject-matter; (4) want of utility; (5) that the alleged invention is a mere application of an old contrivance in the old way to an analogous subject-matter, without any novelty or invention in the mode of applying such old contrivance to the new purpose; (6) that the appliance used by the plaintiff was previously used for analogous purposes; (7) that the plaintiff has been anticipated by other patents. These are the main grounds of impeachment. No doubt there are others, because the able junior for the defendants seems to have traversed the whole

Appeal. 1894. PIRRIE v. YORK-ST. SPINNING CO. Sir P. O'Brien, C.J.

region of patent law in his pursuit of weapons of defence. I shall take the main issues in the order in which I have stated them. Some of them are not very easily discriminated. They run into each other.

As to the first, that "adhesiveness" has not been attained, in my opinion it has been attained for the reasons I have already assigned.

Secondly, as to the want of novelty (I mean novelty apart from the question of anticipation), I think novelty has been established. The compound base—wooden pirn and paper tube—was never used in wet spinning before the plaintiff so applied it; and though the wooden pirn and paper tube were used in dry spinning, they were used in a different manner. The wooden pirn never left the spindle or its immediate neighbourhood in dry spinning, whereas in wet spinning both wooden pirn and paper tube were removed from the spindle to the drying-room, where, after the process of drying had taken place, they parted company, the pirn coming back to the spindle, the paper tube with the dried yarn going forward to the shuttle. The compound base was brought, for the first time, to a new sphere of action, namely, the drying-room, where the wooden pirn dried away from the paper tube, and the paper tube, in the process of drying, took so to the yarn that it became qualified to carry it by itself.

Thirdly, as to want of subject-matter, I think there was subject-matter, because it has been, in my opinion, established, as I have already pointed out, that the plaintiff, by the exercise of ingenuity, discovered a means of overcoming a practical difficulty in wet spinning, and of effecting a new beneficial result. By his ingenuity he discovered how a better, a cheaper, a more workable, and a more merchantable "cop" is produced in the process of wet spinning.

Fourthly, as to utility. This gives me the least trouble. The paper tubes are cheaper, lighter, more portable than those previously in use. Their use removes the necessity of returning the wooden or rigid pirns from the weaver. It saves the loss which the returning of the former carriers sometimes involved. Their use economises time and expense. They command the market; they have suddenly sprung into very general use. The great

demand for them in the market, their very general use, establishes their utility.

As to the fifth ground of impeachment, that the alleged invention is a mere application of an old contrivance, without any novelty or invention in the mode of applying such new contrivance; this objection may be dealt with at the same time as what I have enumerated as the sixth main ground of impeachment, namely, that the plaintiff's patent was not one for which letters patent could by law be granted, inasmuch as the thin, flexible tubes claimed by the plaintiff as a vehicle for wet-spun flax and like yarns had, prior to the plaintiff's patent, been used for analogous purposes. These two grounds of objection, no doubt, are attended with much difficulty. They were pressed with much energy by Mr. Carson and Mr. Meredith in their most able arguments. They partake of the nature of the objections which I have dealt with already; in fact it is hard sometimes to deal with the various grounds of objection separately, as they are closely allied and run very much one into the other. Principally in reference to these two grounds of objection many cases were cited. I will content myself with one, but with one which states the principle or rule of law which is the main difficulty in the plaintiff's way, and has proved fatal to many patents. If the plaintiff's patent can withstand the application of that case, his success is well-nigh assured. The case I refer to is *Harwood* v. *Great Northern Railway Co.* (1). This is the well-known case in reference to the use of what were called "fishes" for connecting railway rails. The proposition upon which that case was founded, the application of which determined the controversy in the defendants' favour, is laid down at p. 673 of the report, by Mr. Baron Channell, who was one of the judges called in to assist the Lords. This proposition had been previously laid down in the same case in the Exchequer Chamber, and was ultimately adopted by the Lords. "In our opinion," Baron Channell said, "the law is correctly laid down in the judgment of the Court of Exchequer Chamber, to the effect that a mere application of an old contrivance in the old way to an analogous subject-matter, without

(1) 11 H. L. Cas. 654.

Appeal. 1894. PIRRIE v. YORK-ST. SPINNING CO. Sir P. O'Brien, C.J.

any novelty in the mode of applying such old contrivance to the new purpose, does not make a valid subject-matter of a patent." It appears to me, but I own after some fluctuation of opinion, that the plaintiff's patent cannot be successfully impeached by reference to this proposition. In the first place, I do not think what he did was the *mere* application of an old contrivance. He used paper in conjunction with a wooden pirn, in a way it was never used before. The compound base which he brought to the drying-room never before was used in flax spinning, and its component parts never before remained in union beyond the spindle or its immediate vicinity. The *modus operandi*, to use the words of Mr. Justice Willes, when giving judgment in the Exchequer Chamber, in the case of *Brook* v. *Ashton* (1), was not the same. Again, can the subject be said to be analogous, which from its very nature presented difficulties peculiar to itself, which, from the absence of saturation, did not arise in dry spinning? The very nature of the subject required the drying process. The compound base, in a new sphere, overcame a special and peculiar difficulty of great practical importance. It appears to me there was novelty in the mode of applying the contrivance to the new purpose. But further, is the purpose an analogous, or cognate, or similar purpose? In the same case of *Harwood* v. *Great Northern Railway Co.* (2), Mr. Justice Blackburn deals with this matter. He and Mr. Justice Shee, no doubt, differed from the other Judges who were called in to assist the Lords, but all the Judges agreed as to the principles of law applicable to such cases, and differed only as to the application of them to the particular case. Mr. Justice Blackburn is reported to have stated as follows:—"We quite agree with the Court of Exchequer Chamber that the *mere* application of an old contrivance in the old way to an analogous subject, *without any novelty or invention* in the mode of applying such old contrivance to the new purpose, is not a valid subject-matter of a patent. . . . But . . . in every case arises a question of fact, whether the contrivance before in use was so similar to that which the patentee claims, that there is no invention in the differences, if any, between the old contrivance and that for which the patentee

(1) 5 Jur. (N. S.) 1027. (2) 11 H. L. Cas. 654.

claims a monopoly; and if there is none, there arises a farther question of fact, whether the purpose to which the contrivance was before applied and the new purpose are so analogous or cognate that there is no discovery or invention in the new application? *Whether, in short, it is a mere application or not?* For if there is invention or discovery, producing a practical benefit, as in the case of *Crane* v. *Price* (1), it is the valid subject of a patent. And we think it must be always a question of degree—a question of more or less—whether the analogy or cognateness of the purposes is so close as to prevent there being an invention in the application. Mr. Grove," he adds, "in his very able argument, contended, we believe correctly enough, that if there was any real invention, though a slight one, producing a practical beneficial result, the patent was good. But the question still remains, was there such an amount of cognateness in the purposes that there was no real invention or discovery."

Such was the language of that very distinguished judge, Mr. Justice Blackburn. Let me deal with it. First, was there any real invention? Well, as I said before, the plaintiff's compound base (pirn and paper) was certainly, as far as wet spinning was concerned, a new appliance, at least in this sense, that never before were the pirn and paper brought together to the drying room. No doubt it was not, strictly speaking, a new appliance. It was known in the dry process, but at least some ingenuity was required to ascertain its efficacy in wet spinning. But again, were the purposes for which paper was used in dry spinning and wet spinning so closely cognate that there was no invention or discovery? It is true that the paper fulfilled, both in dry spinning and wet spinning, the common function of a carrier; but it was introduced into wet spinning for another purpose, and to overcome a special and peculiar difficulty existing in wet spinning, which did not and could not exist in dry spinning; and in my opinion, as the main, paramount, and operative purpose of its introduction into wet spinning was to get rid of a special difficulty and mischief which did not exist in dry spinning, there was not, to use the language of Lord Blackburn, "such an amount of cognateness of

(1) 4 M. & G. 580.

Appeal. 1894.

PIRRIE v. YORK-ST. SPINNING CO.

Sir P. O'Brien, C.J.

purpose that there was no real invention or discovery." In this connection I might refer also to what Lord Bramwell said in the case of *Hayward* v. *Hamilton* (1). No doubt it was with reference to a different class of case, for in that case "a new article" was produced; but, nevertheless, I do not think his words inapposite. He said, "One cannot help making this remark, that it is very strange, if it is not an invention, that it has not been done before. Why has it never been done before? Why, because no one else found it out, which I take to be equivalent to invention; and I think, therefore, the patent is sustainable." It is admitted here that what was done by the plaintiff was never done before, and that the result of his action has been to bring into wide and wide-spreading use the paper tubes the use of which he patented. His discovery is now sought to be disparaged. His action is said to have led to nothing new or nothing useful; but notwithstanding the manifold impeachments that have been made against it, the fact remains, and bears with it a potent suggestiveness, that he was the first discoverer, and that his discovery, or method of user, has been most extensively availed of by the general public, and even by those who attack his patent for want of utility. The case is, undoubtedly, near the line; but I am glad to see my way to deciding in favour of a young man whose illustrations and assistance, even in this Court, showed him to be a man of merit and capacity, and whose skill and energy have, I believe, achieved in the operation of flax spinning a new beneficial result. It is not necessary to refer to the many cases that have been cited. The real difficulty exists in the application of the principles recognised in these various cases. I have already referred to *Harwood's Case* (2), one pressed with much energy against the plaintiff. I think I have shown, but I say so with much diffidence, that the plaintiff's patent cannot be successfully assailed by reason of the general principle referred to in that case, the application of which proved fatal to the plaintiff's patent there. *Gadd's Case* (3) may be referred to. Lord Justice Lindley, who gave so many valuable judgments on patent law, there lays down: "But a patent for a new use of a known contrivance is good, and can be supported, if

(1) Griffin, 121. (2) 11 H. L. Cas. 654. (3) 9 R. P. C. 249.

the new use involves practical difficulties, which the patentee has been the first to see and overcome by *some* ingenuity of his own." No doubt in the case before us there were practical difficulties, and they were overcome by what appears to me to have been some ingenuity on the part of the plaintiff. The important factor appears to be, was there ingenuity displayed in overcoming the difficulty which existed? The difficulty was overcome, and I think there was some ingenuity displayed in overcoming it.

With reference to the contention which was so much pressed, that there could be no valid patent for a method of operating so as to produce a better and more workable "cop," the contention being that, to ground a patent, there should be a new machine, or a new substance, I might refer to the language of Chief Justice Eyre in *Boulton* v. *Bull* (1). He is reported, at page 494 of the report, to have said:—"Probably I do not overrate when I say that two-thirds, I might say three-fourths, of all patents granted since the statute passed, are for *methods of operating* and of manufacturing, producing no new substances, and employing no new machines." This was the view of Chief Justice Eyre in the earlier stages of our patent law. It is the view which prevails to-day.

In my opinion *Lane-Fox* v. *The Kensington Electric Lighting Co.* (2) does not establish the invalidity of the plaintiff's patent. Mr. Carson, however, relied very strongly on what Lord Justice Lindley there said, at page 429 of the report. The learned Lord Justice refers to this passage in *Moser* v. *Marsden* (3), and says that it contains a clear view of what he believes to be the law. The passage is as follows:—"A man who discovers that a known machine can produce effects which no one before him knew could be produced by it may make a great and useful discovery; but if he does no more, his discovery is not a patentable invention: *Britain* v. *Hirsch* (4); *Harwood* v. *Great Northern Railway Co.* (5); *Harton* v. *Mabon* (6); *Saxby* v. *Gloucester Waggon Co.* (7). He has added nothing but knowledge to what previously existed. A patentee must do something more. He must make some addition,

(1) 2 H. B. 494.
(2) [1892] 3 Ch. 424.
(3) 10 R. P. C. 358.
(4) 5 R. P. C. 226, 232.
(5) 11 H. L. C. 654.
(6) 12 C. B. (N. S.) 437.
(7) 7 Q. B. Div. 305.

Appeal. 1894. PIRRIE v. YORK-ST. SPINNING CO. Sir P. O'Brien, C. J.

not only to knowledge, but to previously known invention, and must so use his knowledge and ingenuity as to produce either a new and useful thing or result, or a new and useful method of producing an old thing or result. On the one hand, the discovery that a known thing—such, for example, as a Planté battery—can be employed for a purpose for which it has never been used before, is not alone a patentable invention; but, on the other hand, the discovery how to use such a thing for such a purpose will be a patentable invention; if there is novelty in the mode of using it, as distinguished from novelty of purpose, or if any new modification of the thing, or any new appliance is necessary for using it for its new purpose, and if such mode of user or modification or appliance involves any appreciable merit." In my judgment this case comes within the latter proposition. There was novelty in the mode of use of these paper tubes. They were used in a different sphere, namely, the drying-room; and there was also a substantial distinctiveness of purpose in the plaintiff's application of these paper tubes to wet spinning. The operative purpose, to get over the special difficulty which I have before indicated, was distinct. There was, besides, the expenditure of time and trouble in the making of experiments, and the exercise of ingenuity, by the plaintiff, amounting to appreciable merit. I am therefore of opinion that the statement of the law given by Lord Justice Lindley in *Lane-Fox* v. *The Kensington Electric Lighting Co.* (1) does not militate against the plaintiff's case. No doubt, as I have already said, the case is very near the line—very near the line as regards novelty, subject-matter, analogous purpose; but though near, though very near, the line which divides validity from invalidity, yet nevertheless, in my opinion, within the limits of validity.

Some other points remain to be dealt with, and especially the question of anticipation. I think the several patents which have been produced do not sustain the defendants' case. None of them indicate the difficulty encountered by the plaintiff, or suggest a means of removing it. I agree generally with what the Vice-Chancellor said with reference to the patents which were produced

(1) [1892] 3 Ch. 424.

before him. Booth's patent, and Webb & Craig's, were the two patents principally relied upon before us. In the former, notwithstanding what Mr. Booth himself said as to its being an exact description of plaintiff's patent, the cylindrical bushes, which correspond to the wooden pirns, are fixed to the machine, form part of the machine, and if the tube was made of soft or flexible paper it could not, in wet spinning, be taken off without crumpling; in fact, the material intended as a carrier would be destroyed. It appears to me that in all these patents the paper tube indicated was intended to be of a rigid character. Lancaster's patent applied to dry spinning.

The patent that was most pressed was Webb & Craig's. No one connected with either side of the case knew anything at all about this till after the suit had been determined by the Vice-Chancellor. It was disinterred in the Patent Office after an apparently protracted delving, and affidavits in reference to it, "thick as leaves in Vallombrosa," were showered upon us. I confess I have no sympathy at all with the contention founded upon this exhumed document. However, I must put sympathy aside, and deal with it. In my judgment it was intended to apply only to dry spinning. The suggestion as to the application of paste appears to me to be out of place in reference to a flax spinning frame. This patent was never applied to wet spinning, was never intended to apply to it, and, if it was applied, would entirely fail to meet the difficulties encountered by the plaintiff. I accept Mr. Andrews' statement and expression of opinion with reference to Webb & Craig's patent as well founded. In my judgment, the defendants' case fails as regards anticipation.

With reference to want of correspondence between the provisional and final specifications, I think the defendant's case fails too. There is no real discrepancy between them. The final specification may more fully develop the general idea and plan of the provisional specification. In the present case there is no real discrepancy or inconsistency between them, and his claim is stated with sufficient precision. He specifies what he did, and what he claims, with substantial accuracy and consistency.

As to the rejection of evidence, I think the defendants have not sustained their case. The questions asked were too vague,

Appeal. 1894. PIRRIE v. YORK-ST. SPINNING CO. Sir P. O'Brien, C.J.

were not sufficiently connected with any particular issue; no sufficient foundation was laid for them.

On all these grounds, I am of opinion that the Vice-Chancellor's judgment should be affirmed. I agree with and adopt what he said with reference to Mr. Leathem not being the first inventor. The grounds of objection mainly pressed before us were those founded on alleged want of novelty, want of subject-matter, prior analogous use, mere application of an old appliance. I have formed, after much consideration, the opinions I have expressed with reference to these grounds of objections; and in reference to them the case is, as I have more than once said, very near the border line. On the whole, however, I think the defendants have not sustained their appeal, and that it should be dismissed, with costs.

FITZ GIBBON, L. J.:—

This case occupied more time in argument than any I have heard in my fifteen years service on the bench. The facts and the law are technical, complicated, and unfamiliar, but important. We were buried in mechanics and deluged with authorities. After the hearing I studied the evidence and the cases, and wrote out, independently, the observations which occurred to me, both to form and to formulate my own conclusions, and also to give any assistance in my power to my colleagues in our consultations. I am painfully conscious that what I have written is inordinately long, and, after the judgment of the Chief Justice, it is largely repetition. But it is my duty to state both my opinion and the grounds of it, especially as the reasons for a judgment may give the unsuccessful party the means of picking holes in the conclusion in another place.

The plaintiff has patented "improvements in wet spinning for flax or like yarns." The defendants admit that they are using the plaintiff's "improvements," but they deny the validity of his patent on almost every possible ground, and we have to decide whether that patent is valid or not. The burden of proof rests on the plaintiff. The case depends upon the application of certain general principles to its own special facts; and I think it necessary, in the first instance, to come to a clear understanding of the

nature of the plaintiff's alleged invention, the difficulties which he claims to have overcome, the means and appliances which he claims to have invented, the degree of ingenuity which he has displayed, and the amount of advantage which he has proved to follow the adoption of his invention.

Several prior patents are relied upon as anticipations of the plaintiff's patent. Whether they are so or not will be best understood when the case of the plaintiff has been first considered independently, particularly as he was ignorant of all these prior patents when he brought out his own invention. We were referred to some forty authorities. I believe the general principles to be clear; and previous decisions are of use only either for the statements of those principles which they contain, or for the purpose of illustrating, by example or analogy, the sort of appliance, the degree of invention, the amount of utility, or the peculiar circumstances, which have led to decisions, one way or the other, in more or less similar cases. To fully see the bearing of any authority on the latter ground, a degree of technical education is often necessary, which we do not possess. But at the bottom of all lies an understanding of the plaintiff's invention, and I address myself first to that subject.

The plaintiff claims to have made improvements in "wet spinning." His specification shows clearly that "wet spinning," as therein used, includes the whole process of preparing yarns up to their completion for delivery, by the spinner, to the purchaser or the weaver, ready for sale or use. There is nothing, therefore, in the objection that the specification is too wide because the twisting part of the spinning process is over when the yarn passes the eye of the flyer, before it reaches the plaintiff's appliance. The "like yarns" included in the specification are also sufficiently defined, because the plaintiff's claim covers all yarns which undergo the process of "wet spinning," *i.e.* all yarns that are macerated in the process of spinning. There are such yarns—hemp and tow yarns for example—a distinct class from dry-spun yarns, such as cotton, wool, and silk. The plaintiff must make his claim good as to all such yarns, but to such yarns only; and if he has made a patentable improvement at all, he must show that it is an improvement available for use in the "wet spinning" of yarns made from

Appeal. 1894. PIRRIE v. YORK-ST. SPINNING CO. Fitz Gibbon, L.J.

macerated fibres of every kind. But the claim goes no further. Wide as it is, it is definite. It does not relate at all to dry spinning; and the improvement claimed must be found, if at all, in the overcoming of a difficulty peculiar to the wet process. If the plaintiff has overcome such a difficulty, by a method otherwise patentable, it will not answer his claim to show that a similar method or appliance is employed, for some other purpose, in dry spinning, where the same difficulty does not arise.

The successive changes in that portion of the process of "wet spinning" to which the plaintiff's claim relates, are best stated in the evidence of the defendants witness, Mr. M'Kibben. First, we have the "old bobbins," which are "as old as flax spinning." The twisted fibre was wound upon a wooden bobbin or spool with a double end in the spinning frame, while completely saturated with water. When the bobbin was full, and had upon it a sort of hollow cylinder of wet yarn, varying in size, it was taken from the spinning frame and artificially dried. A specimen produced shows that, in the drying, the wooden bobbin shrunk inwards, away from the yarn, while the yarn stuck together, stretched outwards from the centre of the bobbin, and dried up laterally from the ends. The threads adhered together in a sort of cake, which became completely detached from the wood, being retained on the bobbin only by the projecting ends of the spool. In the specimen, some two inches long and some half-inch thick, the separation caused by the drying amounts to something like one-sixteenth of an inch, between the centre of the spool and the dried yarn, and about the same at each end. The cake of yarn is quite loose, and rattles on the bobbin when you shake it. I mention this to show that the alterations caused by the drying in the relative sizes of the bobbin and the yarn are considerable, and sufficient to create a specific difficulty. These bobbins are still in use apparently for all power-loom yarns, and apparently also for all yarns intended for warps, and for the finest classes of hand-loom yarns. The plaintiff's process is not, at least as yet, applicable for these cases, but there remains a very large class of yarns for which his appliance is used, and it will not invalidate his patent that it is not universally applicable, if it is useful and patentable for those yarns to which it is adapted.

Yarns on bobbins could not be put into the shuttle or sent to market while still upon the bobbins; and therefore all such yarns had to go through the processes of reeling into hanks, weighing for sale, and subsequently being transferred to "pirns" suitable for shuttles, or to the warping frames in the loom, or wound on suitable spools. The first great improvement prior to the plaintiff's patent was the substitution for the bobbin of a wooden pirn, with only one more or less projecting end. This pirn was tapered or corrugated, and in size and surface was made suitable both for going direct into the shuttle, and for retaining the yarn upon it from the time it was wound wet upon the pirn, through the process of drying, until the pirn and yarn together went to the market or to the weaver. They parted company only as the yarn left the shuttle in the loom. Before the 25th September, 1889, the date of the plaintiff's application, various modifications had been made in these pirns, with the object of rendering them cheaper and more portable, and of making the yarn remain on them without loosening or ravelling, until it wound off the shuttle while passing to and fro in the loom. A disadvantage and a difficulty were experienced in this process. First, there was the disadvantage that the pirns cost money, and therefore that the yarn spun upon them cost more if the pirns were sold with it; or if the pirns were not paid for by the purchaser, or went to the weaver, they had to be collected and sent back to the spinner as "returned empties," and there was trouble, and waste, and loss in doing this. This disadvantage was *pro tanto* a set-off against the much greater advantage of getting rid of the reeling, hanking, and winding, but it remained appreciable, having regard to the enormous quantities of yarns and the vast numbers of pirns employed in the trade. Secondly, the difficulty still attending the use of the pirns was a modification of the old effect of drying upon the bobbins. The pirns were still liable to shrink, the yarn was still liable to stretch, and though the pirns were made thinner, and though their surfaces were corrugated, spirally or otherwise, the process of drying still tended to separate them from the yarn, and though the yarn remained on these pirns well enough to make their use a decided advantage, it was often necessary, either for the spinner before sending them out, or for the weaver before putting them

Appeal. 1894. PIRRIE v. YORK-ST. SPINNING CO. Fitz Gibbon, L.J.

into his shuttle, to overcome this tendency of the dried yarn to slip off the pirn by a distinct operation, involving some time and trouble, of "screwing up" the pirn into the dried yarn or "cop." The farthest point to which improvement had gone before the plaintiff's patent is thus described by Mr. M'Kibben:—"In 1889 we introduced a paper tube of rigid paper. It was substituted for the wooden pirn. It was less expensive, and answered the purpose as well as the wooden screw. In each case they were sent to the weavers, and subsequently collected back from them." As to the wooden screw he says:—"The yarn adhered to the wooden pirn properly and sufficiently; all the difficulty was the wood shrunk after drying, and we could tighten the yarn by turning the screw." This is a clear admission that there was no actual adhesion, after drying, between the yarn and the wooden pirn—a point of importance, as I shall have to point out presently.

At this stage the plaintiff took the matter up. All the pirns theretofore used he describes as "rigid—practically the same as wood. All these failed to prevent the flax getting slack on the pirn. I have seen the various pirns used, and their inconveniences. On all of them I have observed looseness or slackness of the yarn on the pirn after the drying process. The screw pirns were used to tighten the yarn; that had to be done to prevent ravelling. These screw pirns were very expensive. The wood is more so than paper. The screw on the *papier maché* pirns is made by the lapping of the paper. I understand that one firm has £3000 expended on these pirns, and there is great delay and difficulty in getting the pirns back from the weavers. I saw that we would have to get over the shrinking of the carrier on the pirn, and that was to be done by making it as thin as possible, and that paper was thin enough; and also that, owing to the natural gum on it as it was wound, when it would dry the gum would help it to adhere to the paper." He made experiments on all the previous inventions. He tested the gum in the flax. He made experiments with paper, and his experience was satisfactory. In the use of thin paper he found the yarn imbedded itself more or less, according to the tension. He found by examination that the yarn gummed itself to the paper tube. He gives affirmative evidence of study, experience, and investigation; and from what I

have seen of the plaintiff, he certainly seems to have the raw material for an inventor—ingenuity and intelligence—to no common degree.

It is obvious that no thin paper tube could be used alone as a carrier for the yarn while both were wet; and bearing this in mind we come to what, if anything, is the essence of the plaintiff's invention, viz. the combined use, for the first time, of a composite carrier, which was put upon the spindle, and consisted, first, of an instrument which is, in my opinion, identical with the "rigid pirn," whether of wood or *papier maché;* and, secondly, of a thin paper tube, which again I must take to be identical with the thin paper tubes previously used alone in dry spinning of cotton, wool, and silk. Here is the plaintiff's account of what he patented as the result of his experiments:—"A wooden pirn is also used with my paper tube. We call this pirn sometimes a socket. When taken off (the spindle), it is altogether wet, with the paper tube adhering to the socket, and all are dried together, and the wooden pirn then becomes detached by shrinking in, and the yarn is left adhering to the paper tube, and in that condition it is sold to the weaver, and is fit immediately to be put in the shuttle. I have seen my tubes in actual use at the weavers. They act well. They are unquestionably an improvement on the former pirns used. The screwing up of the pirns can be dispensed with by it. There is nothing to screw up."

It is essential to note that no evidence has been given of any adherence of the plaintiff's paper tubes to the rigid socket after drying, or of any failure to effect a complete separation between them, as the natural result of the drying. It is clear that the thin paper tubes lift readily and completely off the rigid pirns, whether made of paper or of wood, so soon as they are dry. The importance of this admitted fact on the disputed question of "adhesiveness" between the tubes and the yarn will appear presently.

In my opinion, the flax "cop," with the paper tube inside it, when dried and lifted off the rigid pirn, is, for our purposes, identical with a "cop" of any dry-spun yarn, whether of cotton, silk, or wool. But not only is it no objection to the plaintiff's patent, if otherwise valid, that this identity exists, but his very object was to produce a "cop" of wet-spun yarn which (after drying) would be

Appeal. 1894. PIRRIE v. YORK-ST. SPINNING CO. Fitz Gibbon, L.J.

identical with a dry-spun cotton "cop." The difficulty he wanted to overcome was inherent to the wet process, and was one from which the dry process was entirely free; and the specification expressly says that he aimed at a cheap base like what cotton yarns were spun upon.

I now turn to the specification, to see what the alleged invention is, and also to see the terms in which the plaintiff describes his difficulty, his object, his method, and the extent to which he alleges that his improvement obtains his object. "In making wet-spun yarns," he says, "it is usual to dry the yarn. The evaporation of the moisture from the yarn causes it to shrink, and so become slack upon the bobbin. The object of this invention is to provide a core or tube on which the wet yarn is wound during spinning, and to which the yarn will adhere whilst and after being dried, so that wet-spun yarns of flax and like fibres can be spun in the form of 'cops' with a cheap base or tube, like what cotton yarns are spun upon. This object is effectually accomplished by these improvements in wet-spinning for flax or like yarns, which consist in winding the yarn during the process of spinning upon a thin tube of paper or other suitable material. This tube is carried by a bobbin or socket, which is free to revolve upon the spindle in flyer spinning frames, and in ring spinning frames this bobbin or socket is driven by the spindle."

I observe, in passing, that the "bobbin or socket" in this specification includes all forms of rigid pirn. The pirn is no part of the plaintiff's invention, which consists in putting the paper tube outside the pirn to serve as a core for the yarn whilst and after being dried. Again, this "core," after the drying, is the same as "the cheap base or tube" upon which cotton yarns are spun. The plaintiff, therefore, cannot claim to patent either the rigid bobbin or socket alone, or the thin tube alone, as a valid subject-matter. If the patent be good at all, it must be so as a patent for the use of the two, first together, and afterwards separately. The specification goes on to describe the plaintiff's method of using them. "When the desired quantity of wet-spun yarn has been wound upon the thin tube, it will be tight upon the socket—(*i.e.* the rigid pirn)—owing to its being damp. The yarn, thin tube, bobbin or socket, *as a whole*, are then lifted off the spindle, and removed to a

suitable place for drying; the process of drying causing the bobbin or socket to become free from the thin paper tube, which is left adhering to the dried yarn, which can thus be either woven in shuttles, reeled, or otherwise unwound from the thin tube or base."

The plaintiff then states the advantages of his process. "The bobbins or sockets, after being dried, are returned to the spinning frames, to be re-covered with the thin tubes and filled with yarn. By this method of spinning wet yarns upon a thin tube, separable from the bobbin or socket, the yarns are in a convenient form for either weaving or winding, and are upon an inexpensive base or holder."

So far the provisional and complete specifications are identical. But the following clause is added in the complete specification. "We know that paper tubes or bases are used in spinning cotton or woollen cops; but in the spinning of flax and like yarns by the wet process a difficulty arises in making the yarn adhere to the tube when dry, and it is to overcome this difficulty that we employ thin *flexible* paper tubes, which remain in cop until it is unwound or woven, thus overcoming the difficulty which is experienced when rigid paper tubes are employed." This added clause has been made the subject of argument against the plaintiff. It has been contended that it makes increased adhesiveness the essence of the claim; and further, that it makes the patent bad, no matter what other merits it may have, if the plaintiff's tubes do not overcome the difficulty spoken of, by adhering *more closely* to the yarn than any tubes that were in use before. But I think this is not its real meaning. It was put in as a sort of disclaimer. It does not vary from the original specification. It expressly mentions "paper tubes" as among those "cheap bases" on which cotton and wool yarns are spun, because the plaintiff had been informed of that fact, of which he was not previously aware, by his agent. It describes the difficulty arising from the shrinkage of the yarn in the wet process, which had been already referred to in the original specification. It states that this difficulty was experienced with rigid paper tubes, and I think it very clearly explains a matter to which the defendants arguments were largely addressed, namely, what the plaintiff meant by the word "adhere" as describing

Appeal. 1894. PIRRIE v. YORK-ST. SPINNING CO. FitzGibbon, L.J.

the effect of his invention, and what the degree of "adhesiveness" was which he claimed. This was not any comparative or increased *stickiness*, but only that quality which was, in fact, absolutely essential to his tubes being of any use at all for the purpose of overcoming the difficulty in question. He claimed to have produced a base upon which wet yarns could be spun, which would "*remain in cop* after being dried." He did not mean that the yarn would stick to the paper. As Mr. Jeffers says: "Any adhesion in the way a postage stamp sticks to a letter would be no advantage." The defendants witnesses, as well as Mr. Jeffers, put this very clearly. Mr. Jeffers says: "It would be an advantage for the yarn to adhere to a lighter extent than a postage stamp to a letter." Mr. Spence says: "In flexible tubes the yarn does not adhere to the tubes; it would be an objectionable thing if they did." Mr. Jeffers says: "In the rigid paper pirns we found some heavily sized, and the yarn sticking to them was an objection. The lower wind adhered to that; in fine numbers it would not stand the tension of the shuttle, and broke, causing a good deal of waste. We have been obliged in fine numbers to return rigid pirns on that account." The technical witnesses quite understood the distinction, which the defendants counsel have confounded, between such a degree of adhesiveness as will cause the paper tube "to remain in the cop" during the unwinding or weaving, and actual sticking of the yarn to the tube, which would be a disadvantage, and was never claimed by the plaintiff. The apparent confusion about adhesiveness in the plaintiff's cross-examination, in the evidence of the defendants witnesses, and in the arguments of the defendants counsel, seems to me to rest entirely on the use of the word "adhesiveness" in these two senses, referring sometimes to the yarn sticking to the paper, and sometimes to the paper remaining in the cop until the last layer has been safely unwound.

This added paragraph, therefore, in my opinion, on its true construction in connection with the previous paragraphs and the subsequent claim, does not limit the merit of the plaintiff's invention to making the yarn cling to his thin paper tube, when dried, with more adhesiveness than to rigid tubes. In other words, "effecting greater adhesion" between the inmost layer of the

yarn and the paper is not the vital essence of the improvement, but the claim is to have produced a tube which will "remain in the cop," and will at the same time realize the other advantages of cheapness, portability, and avoiding "returned empties," which were already attained in dry spinning.

But even assuming the defendants argument to be well founded, and that this supplementary paragraph ties the plaintiff down to prove greater actual adherence, I think the balance of evidence on that question is in favour of the plaintiff. In the first place, I think the evidence as to "screwing up" proves that, as a rule, there is no actual adhesion between the yarn and any rigid tube which requires to be "screwed up." If the tube stuck it would not screw. When it is screwed up the adhesion is due, not to sticking, but to elasticity and pressure. Almost all the defendants witnesses prove "screwing up" to be usual and necessary. Mr. Spence is clear: "The wooden pirn is tightened by a screw; in no case does the yarn adhere to the tube." The rigid paper tubes are made with screws on them, and they, too, must have ceased to adhere before they are screwed up. The plaintiff himself swears that his tubes adhere better. Mr. Hamilton corroborates him. Mr. Andrews theoretically supports him. The "pushing in" of the paper no doubt is occasionally done, but a few loose paper tubes may occur consistently with a sufficient degree of adhesiveness to make the tubes generally "remain in cop." The "pushing in" does not necessarily imply "solution of continuity," as screwing up does. The plaintiff says "there is nothing to screw up." *A priori*, a thick, hard, or rigid tube, with a smooth surface, will shrink inwards, and separate from the yarn in drying, more easily than thin paper with a rough surface. *A priori*, wet yarn will imbed itself more easily in paper. Mr. Hamilton swears "that is better done with the rough surface of the paper than with any glazed one." The defendants witnesses, when they deny that the paper tubes adhere at all, plainly use the word in the sense of sticking; but they all show that the "screwing up" is general with the rigid tubes, and the "pushing in" is only occasional with the thin paper. Mr. Wilson says "that only occurs in a proportion of cases." Though Mr. Leathem says "there is no difference," he says also that "the flexible

Appeal. 1894. PIRRIE v. YORK-ST. SPINNING CO. Fitz Gibbon, L. J.

tubes adhere to the coarser kinds fairly well." Mr. Wilson admits that it is only "sometimes" that the yarn leaves the paper; that it is only "several" that he finds in the boxes lying off the shell. This evidence contrasts strongly with the proof that screwing up the rigid tubes is a general and a necessary process, and that girls are regularly employed at it. The thin paper seems never to stick to the rigid pirns, and this is a strong proof that the yarn does not stick to them either; and on the whole I think there is a substantial preponderance of probability and of evidence, in favour of the plaintiff, to show that, even in point of actual adhesiveness, his thin paper tubes are better than the best of the previous rigid pirns, and that the latter must be "screwed up" to make the yarn remain upon them. Not only, therefore, is the operation of "screwing up" saved by the plaintiff's method, but its very adoption proves that the rigid pirns do not adhere until screwed up. On the weight of evidence, too, we must remember that all the trade is hostile in interest to the plaintiff, and I infer from the weakness of the defendants evidence, especially as it is expert evidence, that the positive statements of the plaintiff and of Mr. Hamilton could not be more distinctly contradicted, and are true.

The introduction of the word "flexible" into the description of the plaintiff's paper tubes in the complete specification was also relied on. It adds nothing, in my opinion, to the description of the "thin tube," the "cheap base or tube like what cotton yarns are spun upon," and the "thin tube separable from the bobbin or socket after drying" and yet adherent to the yarns, contained in both the provisional and the complete specifications. "Flexible" was perhaps not a happy adjective, but all the witnesses for the defendants show that they understood it. It meant compressible, yielding, soft; in fact it only meant "like paper," "not hard," "not rigid." It meant something having the quality which the plaintiff, throughout his experiments, was aiming at, something "as thin as possible," "something in which the yarn would imbed itself," something which, when dry, would be thin and cheap and light, and not worth collecting or returning, but yet stiff and strong enough to keep the dry yarn upon it while going through the market or into the shuttle. All this, and no more, is, as it

seems to me, summed up in the plaintiff's claim. "What we claim is the use of thin, flexible paper tubes, as a vehicle for wet-spun flax or like yarns, during the processes of spinning and drying, for the purpose of unwinding or weaving." The processes, the difficulties, and the objects are sufficiently described in both the original and the complete specifications. I can find no fatal variance or formal defect in the specifications, and the defendants must therefore meet the plaintiff's patent on its merits, which I now proceed to consider.

The main questions in the case are:—

(1) Is this contrivance or method novel? In the first instance, I shall treat this question on the evidence, apart from the question of anticipation by previous patents, for that question must be answered by comparing the previous patents, one by one, with the plaintiff's patent.

(2) Is it useful?

(3) Does the plaintiff's invention involve a sufficient exercise of ingenuity to make it a good subject-matter for a patent? This third question again divides itself into two: first, was there an actual exercise by the plaintiff of mechanical ingenuity sufficiently meritorious to deserve a monopoly by patent; and, secondly, was the plaintiff's use of the old appliances which he employed, namely, the rigid paper pirn and the thin paper tube, so analogous to the previous uses of the same appliances, that the mere transfer of them to wet spinning, or the mere employment of them together, where each had been previously employed separately, was something so obvious or so simple as not to require a patentable amount of ingenuity to hit upon it. Put in this second way, I confess that the question seems to me to run very much into the question of novelty; but for clearness sake I will deal with it under the head of ingenuity or invention. I am satisfied that there was nothing new in either the thin paper tube or in the rigid pirn or core on which it was placed, if taken separately and alone.

I propose to take these questions in order. First, novelty, apart from anticipation. Nobody before the plaintiff ever put into a wet-spinning frame a base for the yarn which was afterwards divided into two by the natural process of drying. Nobody

Appeal. 1894. PIRRIE v. YORK-ST. SPINNING CO. Fitz Gibbon, L. J.

before the plaintiff ever spun yarn wet upon thin paper, because no one thought of mounting the paper on a rigid tube, thus making it capable of carrying the yarn when wet, and of afterwards restoring its ability to carry the yarn by drying it. Nobody before the plaintiff ever sought to meet the difficulty of shrinkage in drying, by adopting a base which would separate outwards from a stiff core, and remain with the yarn cop after it was dried, while the stiff core shrunk inwards, and became thereby ready for use again. Nobody before the plaintiff ever produced a dried cop of wet-spun yarn on a base so thin, so light, and so cheap, as not to be worth collecting, returning, or using again, and yet sufficiently strong to carry the dried yarn into the shuttle, and on to the end, until it had been unwound or woven, when the base might be thrown empty away.

This *double base* is, in my opinion, novel. The use of it, and of each part of it, is novel, because the rigid part is used in a new way, by being used only to stiffen the paper while wet, by going no further than the drying-room, being there separated from the yarn, and then sent back across the yard, without leaving the mill, to be used again and again for the same purpose. The thin part is used in a new way, by being, for the first time, put into the spinning frame upon a rigid core, which goes with it through the process of drying, in which the thin tube dries outwards, keeps company with the yarn, leaves the core behind, and goes on with the flax into the market or to the weaver, and finishes its course for ever when it is thrown empty away. The process is novel—first, in putting a thin paper tube on a rigid pirn; secondly, in drying both together, with the natural consequence that they separate; and, thirdly, in lifting the thin tube and yarn together off the rigid pirn in the drying-room, sending the rigid pirn back to serve again, and sending the thin paper tube and yarn out into the world.

The next question is utility. On this the evidence appears to me far stronger for the plaintiff than on any other branch of the case, when we consider what "utility" means in such a patent. If a man invents a new *article*, or a new *product*, its cheapness will not necessarily demonstrate its utility, for it may be "cheap and nasty," and the saving in price may only mean an equal or

greater loss of quality, or inferiority in value. But where the subject of a patent is an improvement in the *process* of manufacturing a known and merchantable article, such as yarn, if the article produced is the same, every saving of time, labour, trouble, or expense in the process of manufacture must necessarily, *pro tanto* and of itself, be useful, because it necessarily reduces the cost, or facilitates the production, of the same finished commercial thing. That the use of the plaintiff's tubes is, in this sense, useful, appears to me to be proved, over and over again, by the witnesses on both sides. Every admission of economy, every admission of cheapness, every adoption of the plaintiff's tubes in preference to others, is direct evidence of utility. I have already read the plaintiff's evidence, that the tubes are unquestionably an improvement on the previous rigid pirns. Mr. Taylor proves that "all were in search for improvements; that a very large sum of money is usually invested in pirns." Mr. Andrews says that the plaintiff's patent "would have met his difficulty if he had had it," when he was experimenting upon the means of meeting the difficulty arising from the shrinking of flax yarn in the course of spinning, so long ago as 1861. Mr. M'Kibben introduced a tube the same as the plaintiff's patent after the date of his patent, and though he says he did so "solely for cheapness," this cheapness plainly covers not only saving of expense, but saving of time and trouble; and the defendants are extending the use of the soft paper tubes, and are defending this case, because it is worth their while to do so. Mr. Lister says that "the paper tube is cheaper for export," and is a "cheap base" for carrying the yarn during unwinding or weaving. Mr. Travis says, "We get them as thin as we can to send away, as so much cheaper"; and when he speaks of enjoying this advantage in cotton spinning, it follows that it is an advantage when extended to flax. Mr. Spence says that "The flexible tube has no advantage over the other, except economy"; but he says, "We have used the flexible tubes for the last three years continuously, £5000 worth in the year; they are used as a complete substitute for the rigid and wooden pirns on account of their cheapness; the wooden pirns are the dearest, the rigid ones next, and there is a difficulty in collecting them back from the weaver, and many are lost." Mr. Jeffers says, "The flexible paper tubes

Appeal. 1894. PIRRIE v. YORK-ST. SPINNING CO. Fitz Gibbon, L. J.

have almost taken the place of the other two classes of pirns for the last two years; we use large quantities of them." Mr. Leathem says, "The brown paper tubes did fairly well; we have used them ever since, and they are doing fairly well at the present time, with a spring shuttle made to suit; we have never used any other pirn more satisfactory than this for coarse yarn; we have used no other for coarse yarn; before 1889 we wound coarse yarn out of hanks." Mr. Eaves says, "We had bought over six millions of rigid paper tubes before plaintiff's patent; we use plaintiff's thin tubes at present, from November, 1889"; and though he says, "We only used plaintiff's tubes for their cheapness, for everything else they are a disadvantage," I think he explains away the effect of this, and shows that there is no disadvantage, but quite the reverse, by his first pregnant answer on cross-examination, "We are paying plaintiff about £27 per month royalty at the present time." He seems to me to prove the utility of the plaintiff's patent by the following answer:—"The quantity of rigid tubes we are now using is a diminishing quantity; we use the soft paper tubes in preference to rigid ones; when we have to buy pirns we buy soft ones; the flexible tubes are driving the rigid ones out of the market." Mr. Eaves gives a practical proof, *ad hominem*, of the utility of the plaintiff's patent, for he has actually taken out a patent himself for an improvement upon it. After he heard that Messrs. Taylor were using the plaintiff's tubes, he experimented upon them, and took out a patent for corrugated cores, upon which he mounted the plaintiff's tubes. He says, "Plaintiff's patent was different from mine, and the two things could be used together; I consider mine made his perfect for coarse yarns"; but he adds, "We use the flexible paper tubes (*i. e.* the plaintiff's tubes) in large quantities on plain wooden pirns, not corrugated; one quality of the flexible tube is that when placed in the shuttle they are distended and tightened; they can be made equally useful for both coarse and fine yarns by devices applied to them." Accordingly, whether alone or with devices applied to them, they are practically useful, and in use. Mr. Wilson says, "We commenced with rigid paper tubes, and afterwards used, and now use, thin paper; we commenced these in June, 1890; we did so solely for cheapness; the thick ones cost 7d. per lb., and the thin ones

3d., and the thin ones weigh one-fourth of the rigid." That is to say, nine of the plaintiff's tubes can be got for the same price as one of the best and cheapest tubes previously in use—no inconsiderable measure of utility, when the vast numbers are taken into account. Mr. Caithness says, "We have used them in considerable quantity for economy; they are cheaper and more portable"; and on cross-examination, "We use the plain wooden pirn, both with and without the paper tube; we don't now send the wooden tubes out to the weavers; the flexible tubes are driving the others out of the trade." Upon this evidence, I entertain no doubt that the plaintiff's method of using thin paper tubes involves economy of money, trouble, and time; and in a manufacturing process, this is "utility" in a mercantile sense.

But the defendants allege another objection on the ground of utility. They say that what the plaintiff claimed was "increased adhesiveness," that this is not proved, and that therefore his patent is bad, because his invention does not attain the beneficial object alleged in his specification. I have already dealt with the evidence, and the meaning of the patent on this point. But as a plea of inutility, what does it mean? Put into legal language, it means, and it must go to this, that the patent is bad, because the Crown was deceived in its grant, and the alleged public advantage is not attained. I have already given my reasons for thinking that this argument rests on an ambiguous use of the word "adhesiveness," and I cannot better express my view of the real meaning of the specification, or better answer this objection, than by quoting a passage from the Vice-Chancellor's judgment:—"The advantage in point of cheapness of the plaintiff's tubes, which has been proved beyond doubt, is the main ground of their success; but the property of adhesiveness, at least to coarser yarns, appears to some extent sustained. It is important to bear in mind that the real question is not confined to whether there is more adhesiveness attained by the plaintiff's process than existed in the case of hard or rigid pirns, for it embraces this also, whether the plaintiff has invented a process by which it is possible to use soft paper tubes in wet spinning with *adequate* adhesiveness—a thing admittedly not done before, and which has been productive of public utility. The plaintiff has not based his application, or defended

Appeal. 1894. PIRRIE v. YORK-ST. SPINNING CO. Fitz Gibbon, L.J.

his patent, on the *superior* adhesiveness of his tubes alone, but also upon having invented a mode of using these cheap thin paper tubes in wet spinning in such a way as that the yarn will sufficiently adhere to them in the process of wet spinning and drying, and having thus enabled these cheap tubes to carry the yarn, when dried on them, to the weaver, in a state to be put by him into the shuttle without any process of unwinding and re-winding, a thing that was theretofore not supposed to be attainable." The impression produced on my mind, by a careful study of all the conflicting testimony, as to the relative adhesiveness of the yarn, when dried, to the plaintiff's thin tubes as compared with the former rigid tubes, is that neither is perfect, but that, on the whole, especially for coarser yarns, the plaintiff's tubes are rather better. The necessity for screwing up the rigid tubes indicates that they do not adhere, and the occasional pushing in of the thin tubes into the cops is neither as frequent, nor does it involve as much care, time, or trouble as the screwing up of the rigid tubes. On the whole, as I have already said, I think there is a balance of evidence, even on the question of relative adhesiveness, in favour of the plaintiff's tubes, and they have the exclusive and additional advantages of cheapness, lightness, and portability, and economy of returning "empties." These advantages are expressly claimed in the specifications; the tubes are sufficiently adhesive to serve their purpose, and the uncontradicted evidence from all sides of their mercantile value, and of their driving all other tubes out of the market, conclusively, in my judgment, decides the issue of utility in favour of the plaintiff.

Next in order comes the serious question of the adequacy of the subject-matter of the patent, or, in other words, the question whether the plaintiff has displayed in his invention such an amount of ingenuity as to render him a meritorious patentee. If his invention is novel, and is of mercantile value and utility, that goes a long way to prove his ingenuity, because he has produced a desirable result that nobody ever attained before. I have already referred to the evidence which he gave of study and experiment, and to the evidence of others, who prove that there was a known difficulty to be overcome, a known advantage to be attained, and that several who had experienced the difficulty had

been trying to overcome it in different ways, but had not succeeded. The mercantile value of the plaintiff's invention is both the proof and the measure of the extent to which he advanced beyond all previous inventors; and the more of them who tried it, and the farther he advanced upon their efforts, the more clear is the inference that he must have possessed and exercised an amount of ingenuity greater and more meritorious than that of his predecessors. Upon such a subject, lawyers and judges, who are not mechanics, should be slow to deny ingenuity, or to minimise the merit of a mechanical discovery. Both on this issue and on that of novelty, Mr. M'Ferran's evidence is important. The plaintiff is the manager of the mechanical portion of Messrs. Taylor's business, of which Mr. M'Ferran is the managing director. He knows the plaintiff for many years. He was in daily communication with him. He swears that it was the plaintiff who first devised the plan of thin flexible tubes. Mr. Eaves thought the invention sufficiently meritorious to justify his patenting an improvement upon it. He discussed with the plaintiff the difficulties to be overcome, and he experimented on his tubes in improving them. Mr. Leathem, though he suggested that "something to go right through the cop, like as in cotton, would meet the requirements of the manufacturer," says that "up to that date he had never received any flax cop on a thin paper tube." Under all the circumstances, and upon the evidence, being satisfied that the plaintiff originated a novel idea, worked it out, and produced a new and valuable mercantile appliance, which nobody had invented before, I do not think a Court of Justice should be astute to belittle the ingenuity, or to minimise the merit, of the man who thus produced a public benefit; and I am of opinion, therefore, that the plaintiff's patent does not fail, on general grounds, for lack of ingenuity, or in other words, of cleverness, in devising his appliance.

A subsidiary question, or rather a different way of putting the same question, arises in consequence of the fact, which I must hold to be proved, that neither the rigid tube nor the thin paper tube was a new instrument. I cannot find any evidence of novelty in either the one or the other, used alone; and therefore the plaintiff must show that his method of using the two together, and of using the thin tube separately, is more than a mere transfer of an

Appeal. 1894. PIRRIE v. YORK-ST. SPINNING CO. Fitz Gibbon, L.J.

old tool to a new function: in other words, that his use of these two tools together is not a merely analogous use to that for which they were previously employed, such as was held in *Harwood* v. *Great Northern Railway Co.* (1), to be no good subject-matter for a patent. Substantially I have answered this difficulty already. The answer rests on the fact that the two tubes were never before used together, and that the use of each of them, and especially of the paper tube, in the plaintiff's combination, was not the same as before. While the combination was adopted, and was successfully employed, to get over a difficulty arising only in wet spinning, and arising in every case in which a single core or tube was used, no previous tube or core was put through the process of separation in the act of drying, and this separation had never been made the means of producing a dry cop in a mercantile shape on a thin paper tube fit to go alone into the shuttle, after it had been subjected to the drying process. To that extent, and in that manner, the plaintiff's use of the old tool is, in my opinion, not analogous to any former operation, and on this question also all that I have already said applies, to make us slow to invalidate the plaintiff's patent.

One small matter I mention here. It was said that the "doubling" process in cotton was a process of wet spinning, in which thin tubes were employed. The facts displace the argument of the defendants on this point, for the thin tube used in "doubling" was never wet, there was no shrinkage, and there was no artificial drying, and the difficulty which the plaintiff claims to have overcome never arose at all.

I next take up the previous patents. The defence of anticipation by previous patents is in substance a special plea of want of novelty. It requires careful consideration, and a comparison of the plaintiff's alleged invention with each of those previously patented. But while it is plain that two patents cannot co-exist for the same thing, the things patented must be substantially the same in method, in principle, and in construction, before one patent will displace the other. I think, too, that there is authority for saying that a new and useful and actually working patent,

(1) 11 H. L. Cas. 654.

of practical value, is not invalidated by the mere fact that there is some old specification in the Patent Office that never was of any real use, but which describes an apparatus, abortive for any good purpose, unknown to the later inventor, though, if he had seen it, it might have helped him to discover, or might even have suggested, the improvement which the second patentee for the first time produced in a commercially valuable shape. There should be no sympathy with a systematic attempt to deprive the meritorious inventor of a useful instrument of the fruits of his discovery, by exhuming something like it from the "limbo of forgotten things"; and it seems to be now a profession to grub up still-born patents, in order to rob living inventors of the fruits of their ingenuity. This system was never carried further than in the present case, for Webb and Craig's patent, the most formidable to the plaintiff, was only discovered after the Vice-Chancellor's judgment, by carrying back a "negative search" through some thirty thousand specifications, to the year 1858, ending in the production of a patent never carried into use outside the walls of the now long-departed inventors own mills at Tutbury. But I think that an examination of these previous patents will show that none of them describes the plaintiff's invention, deals with the difficulty incident to the wet-spinning process, or includes the particular use of paper tubes which the plaintiff has patented as a means of overcoming that difficulty.

Booth's patent is for improving the spinning machine in several respects, and amongst the rest by mounting on the spindle a cylindrical bush, so "formed as to receive and hold a light tube of sheet metal, wood, gutta-percha, paper, or other suitable material, constructed to answer the purpose of a bobbin." The specification states that "for wet spinning or doubling, the tubes," meaning the light tubes mounted on the cylindrical bushes, "may be made of metal of a non-corrodible nature, such as brass, tin, &c." Both the bushes and the light tubes were intended to be tapered, but the specification contemplates "screwing, brazing, soldering, or otherwise *conveniently securing the cylindrical bushes to the spindle*." The mode of using the invention is thus described: "Upon the outer surface of the taper tube is fitted the bobbin, which, in my arrangement, consists of a thin shell, composed of

Appeal. 1894. PIERRIE v. YORK-ST. SPINNING CO. Fitz Gibbon, L.J.

either metal, hard wood, paper, gutta-percha, or hard rubber, and upon which the yarn being spun or doubled is wound. When a full bobbin is made, the shells or bobbins carrying the yarn may be lifted off, to be replaced by other shells of corresponding size or form." I must concede that Booth describes thin paper tubes, which I cannot distinguish from those used by the plaintiff. Mr. Carson triumphantly relied on an answer which he got in cross-examination from Mr. Hamilton—"Is that patent an exact description of the plaintiff's invention, if applied to flax?" Answer—"Yes; if it relates to flax." The specification mentions wet spinning, and therefore it must, in my opinion, "relate to flax." But the question was a catch. *How* does it relate to flax? Not at all as the plaintiff's invention did. Booth's "cylindrical bushes" correspond to the plaintiff's rigid pirns; but in Booth's patent they are used as an integral part of the spinning machine. They are fixed or secured to the spindle. The object of their introduction is to give additional efficiency to the spindle by increasing its diameter, and to facilitate the removal of the "full bobbin" by tapering the base on which it rests. Booth's "thin shell" corresponds to the plaintiff's "thin paper tube," but it alone is intended to be removed with the "full bobbin." In the wet process Booth's tube must be made of non-corrodible substance, and if made of "brass, tin, &c.," it must necessarily be rigid. If made of paper it could not be used in wet spinning. The full bobbin could not be lifted off, as Booth intended, unless the core was able to resist the wet. If made of metal, it would, when dried, have no "adhesiveness," and would have none of the advantages of the thin paper. The specimen of Booth's tube produced was in fact a tube of tin—singularly like a penny whistle without the holes—an appliance which could not be put through the drying process, or into the shuttle, or sent to the market, with any of the advantageous results attained by the use of the plaintiff's tubes. Therefore, Booth did not anticipate the plaintiff's improvements in wet spinning.

M'Gee's patent was hardly relied upon. Its object was to improve the machinery for winding sewing-thread upon paper or other tubes "in conical layers, so that it can be drawn off endways, and without rotation of the cop." It had nothing to do with the

wet process, and nothing to do with the spinning machine. The spindles mentioned in it are the spindles of "winding frames."

Lancaster's patent was to facilitate "doffing," a good old Saxon word, describing the lifting of the "full bobbin or cop," with its base, out of the spinning frame. I cannot quite adopt the Vice-Chancellor's description of this as "a process wholly different from that which the plaintiff's tubes were applied to," because this process of "doffing" is the very same process which takes place in wet spinning, when the rigid pirn, thin paper tube, and full cop, are all together lifted off the spindle. But Lancaster's object and claim are to obviate the loss of time which accrues in "doffing" by stopping the spindles; and as compared with the plaintiff's patent, Lancaster's and Booth's patents are identical. No doubt Lancaster's tube ("Figure 5") is very like the plaintiff's thin paper tube. He describes it as "very thin and light," and "more readily transported from place to place" than "a heavy wooden bobbin," and he says, "the yarn can also be steamed." "This tube," he says, "may be made of paper or any suitable material"; and he expressly says that "he does not limit himself to the use of any particular material for any part of his arrangements." I therefore cannot confine him to dry spinning. But the essential difference between Lancaster's patent and the plaintiff's appears in the description of what he claims as his invention, which is as follows:—"In spinning and doubling machines a bobbin (F), *fixed upon and rotating with the spindle* (A), in combination with an enveloping tube (G), upon which the yarn is spun." Mr. Carson again got Mr. Hamilton to answer:—"It would fairly describe the tube in plaintiff's patent; the physical construction of it and the plaintiff's are the same." But the use and the purpose are both different. If Lancaster's tube is made of paper, the "doffing" must be done dry. If the "doffing" is done wet, the tube must be non-corrodible and rigid; and even if the mill-hands, in working Lancaster's patent, do sometimes "doff" the bobbin (F) with the tube (G), this is only a momentary operation. Lancaster intended that it should not take place; the work which he facilitated was all to be done at the spinning machine, and the thing "doffed" and sent out of the spinning-room, whether wet or dry, consisted, under Lancaster's patent, of the thin tube only, with

Appeal. 1894. PIRRIE v. YORK-ST. SPINNING CO. Fitz Gibbon, L.J.

the yarn upon it. The evidence goes to show that Lancaster's patent was never, in fact, applied to wet spinning; and as applied to dry spinning, Lancaster's appliance would be the same as Booth's, for all the purposes of our case.

Tatham's patent is for winding spun or twisted thread on a paper or other tube on the shell. It could work only in the dry process, and the object of the invention was to improve the action of the spindle as to tension and drag. It had no reference to the difficulty arising from drying.

The last in order, but first in date and in importance, is Webb and Craig's patent, of which the object is "to obtain yarns or threads in a suitable form for transport, and at the same time in a proper condition for being used by the manufacturer." "This," they say, "we accomplish by performing the operations of spinning, doubling, winding, and warping, or their equivalents, upon tubes constructed of paper or other such material, so as to be light for carriage, and sufficiently economical for temporary use, as well as to save the expense of reeling and re-winding." All this is painfully suggestive of the plaintiff's specification. But what is their invention? They say, "We spin or double upon paper or other such tubes as aforesaid, which tubes are adapted to the ordinary spindles, and when the required quantity of material is wound thereon, it is removed together with the tube, which, therefore, remains and stands *in the place of an ordinary bobbin*, so as to be suitable for application to any machine in which bobbins of fibrous materials are used, so that the operation of re-winding from the hank, or the extra carriage and loss arising from the transport of bobbins is saved." They also say that, "The paper or other such tube may be placed direct upon the spindle; but in such case the said spindle should be tapered. Our object in adopting that form for carrying the paper tubes being their ready removal when filled." They remark, "We are aware of short tubes of paper having been used on mule spindles; but in such cases the said tubes are only applied to one end of the cops, whereas, according to our invention they constitute the whole surface upon which the yarns or threads are wound." They claim, as secured to them under their patent, and as applied "for receiving yarns or threads in spinning, doubling, winding, and

warping, or their equivalent operations, the use of tubes composed of paper or other such material as aforesaid." A mass of affidavits have been filed as to this patent, and I think it is proved, for the defendants, that Webb & Craig's specification corresponds, in its essential features and in its terms, with the plaintiff's specification, so far as the construction of the tubes, and their use on the spindle, are concerned. In Figure 1 the tube "e. e." is shown as extremely thin. The specification states that, "Three or four folds of brown paper, wound upon a roller and pasted at their ends, are sufficient for the purpose; but they may be wholly or in part of other material possessing the requisite properties and answering substantially the ends of the invention, as before explained." The defendants rely on the fact that Webb & Craig's specification, in terms, is general, and that therefore it is applicable to both dry and wet spinning; but to show that it in fact related to dry spinning, the plaintiff not only relied on affidavits, but he also refers to the remark which the specification itself contains, that "When the material is wound into the form represented in Figure 1, we find it of advantage, previously to removing the tubes, for the attendant, as they revolve, to apply a thin layer of paste or such other matter to the conical ends, so as to secure threads at those parts from displacement." This operation would be impossible, either in a flax spinning frame, or as applied to wet yarn. The evidence is conclusive that Webb & Craig's patent never was applied to the purpose of the plaintiff's patent. It is open to the same answer as Booth's and Lancaster's, viz. that it was directed to facilitate *spinning*, and had nothing to do with *drying* or its effects. Their tube appears to me most closely to resemble the rigid *papier maché* pirn, and was to be used alone. If I am right that the plaintiff is the first to claim the use of thin paper tubes upon rigid pirns up to the end of the drying, their separation then, and the sole use of the thin paper tubes alone afterwards, as *vehicles for the yarn*, Webb & Craig's patent is not directed to meet the same difficulty, does not follow the same method, nor attain the same advantages, and therefore is not an anticipation.

Lord Westbury's judgment in *Hills* v. *Evans* (1) contains the

(1) 31 L. J., Ch. 463, 466; 10 P. C. 40; 4 De G. F. & J. 300.

Appeal. 1894. PIERCE v. YORK-ST. SPINNING CO. Fitz Gibbon, L.J.

following passages, which I apply to all the previous patents in this case, as compared with the plaintiff's:—"If something remains to be ascertained, which is necessary for the useful application of the discovery, that affords sufficient room for another valid patent. . . . There may be a latent truth in the words of a former writer, not known even to the writer himself; and it would be unreasonable to say that there is no merit in discovering it to the world. Upon principle, therefore, I conclude that the prior knowledge of an invention to avoid a patent must be knowledge equal to that required to be given by a patent, namely, such knowledge as will enable the public to perceive the very discovery, and to carry the invention into practical use; and this appears to be consistent with decided cases. . . . I cannot find in any one of those patents a clear, distinct, and definite indication of the admittedly beneficial discovery that was afterwards made by the plaintiff." To the same effect, and equally applicable, is Byles, J.'s way of putting the question to a jury in *Bovill* v. *Goodier* (1):—"There may have been a great many experiments before the real thing was found out; nay, sometimes what turns out to be the real thing has often been used, but only by way of experiment, and then given up. That is not an anticipation of a patent. A man must have brought his invention, or his invention of a combination, to a successful issue, so that the thing can be done, and it must be done not as a mere experiment. Mere experiment or unsuccessful user is not an anticipation; still less is the possibility of a man doing that which he did not do an anticipation. If he had a machine which did do the thing, and he did not do it, and knew nothing about it, this being a patent for a process, that is not an anticipation."

All these prior patents, in my opinion, help the plaintiff in two ways. They show that although thin paper tubes, and even double cores, had been used before, the use of a thin paper tube to get over the difficulty of shrinkage never occurred to anybody but the plaintiff; and they show also that his method of using these tubes is distinct in its purpose, and is not analogous in its mode, when compared with any previous invention.

(1) Griffin, 48.

Upon the facts and circumstances, therefore, my opinion is in favour of the plaintiff upon all the main issues which go to the merits of his case.

Before referring to the law, I must advert to one minor ground of appeal, which Mr. Carson put forward in his opening with some show of earnestness, but which Mr. Meredith in reply almost passed over; I allude to the rejection of evidence. It is to be observed that the notice of appeal does not refer to it, and does not ask the only relief to which it could lead, a new trial, or the re-opening of the evidence here. It rests entirely on the disallowance of two questions, of which one was put to Mr. Leathem, and the other to Mr. Eaves. Mr. Leathem was asked: "Did you make a suggestion to any other person, at the same time, about the introduction of the paper tubes?" and Mr. Eaves was asked: "Prior to September, 1889, had you a conversation with Leathem with reference to the use of these paper tubes?" The "same time" referred to in the first question was when Mr. Leathem had a conversation with Mr. Eaves "on the subject." The subject referred to would appear to be that of a conversation between Leathem and M'Ferran, in 1889, about September or October, about the expense of wooden pirns, and the use of paper as a substitute for wood, when a suggestion was made to M'Ferran that "something to go right through the cop, like as in cotton, would meet the requirements of the manufacturer." The date of this conversation is only fixed by the statement that up to that date Mr. Leathem's employers had not received any flax cops on a thin paper tube. Mr. M'Ferran says that his conversation with Leathem, and his interview with Eaves both took place after the application for the patent—that is to say, after September 27, 1889; and the defendants made no attempt to contradict this positive testimony that the alleged conversations were too late to be material. But however that may be, when the questions were disallowed, no effort was made either to press them at the time, or to lay any foundation for repeating them, by proving any circumstances that could make the suggested conversation evidence. As put they must stand or fall. How were they material? To what issue did they relate? In Leathem's question, "any other person" appears to mean any person other than Eaves. If it was intended

Appeal. 1894. PIRRIE v. YORK-ST. SPINNING Co. Fitz Gibbon, L.J.

to prove a conversation with either M'Ferran or Pirrie, the mention of their names would have put an end to the objection. Other conversations with both of them were proved; but the question, as put, seems to me to be as inadmissible as if counsel had asked: "Did you ever make a suggestion to a man in the street about the introduction of paper tubes?" The question put to Eaves was, if possible, worse, for it named Leathem, a stranger to the patent, as the person with whom the conversation took place. The only issues to which evidence possessing any resemblance to this could be pertinent would be the issue of novelty, and the issue whether the plaintiff was the true and first inventor. It is well settled that an inventor who first works out a valuable discovery, and who first produces a patentable appliance, is not to lose his patent because the same idea had occurred previously to some one else, or had been vaguely suggested by some one else, but without coming to anything. If the question was intended to bring out that somebody had said something, which had reached the plaintiff or M'Ferran, and which had put the idea of the patent into their heads, such evidence would only amount to a depreciation of their inventive merit; it could not affect the validity of their patent. If, on the other hand, it was intended to show that some one else had actually anticipated their discovery, and had published it in conversation, the anticipation should have been alleged in the particulars, and it should have been shown that the question led up to proof of it. I cannot entertain a doubt that neither of these vague suggestive interrogatories was admissible in the terms in which it was asked. Before asking them, some foundation should have been laid to show that they were relevant. No doubt counsel are often permitted to ask such questions, on an undertaking, or an understanding, that they will afterwards be made evidence; but that course is more necessary or proper at *nisi prius*, or on cross-examination, than in giving direct evidence-in-chief before a Chancery Judge. The very least that counsel was bound to do, if he attached any importance to these questions, or intended afterwards to rely upon their rejection, was to press them, to tell the Judge how they were material, to state what facts he proposed to bring forward as a foundation for them, or at least to offer an undertaking to make them evidence in due course. If it

was intended to prove that Leathem or Eaves, or some unknown person who conversed with them, and not M'Ferran or Pirrie, was the "real first inventor," had invented the plaintiff's appliance, and had published it—if that was the object of the evidence—the disallowed questions began at the wrong end. The prior discovery should first have been alleged and proved, and then the defendants might have proved its publication. No trial or verdict would be safe, if it were open to counsel to put questions such as these, drop them when disallowed, say no more about them, and then rely upon their disallowance in a Court of Appeal, as entitling his client to judgment, or to a new or further trial, upon the ground of the rejection of legal evidence. This result would be all the more startling in the present case, where it does not appear that the slightest importance was attached to the rejection of the questions in the Court below, and the subject was never referred to again, either by counsel or by the Vice-Chancellor.

Having dealt with the facts, it remains to discuss the law and the authorities, premising that the general principles are clear, and that other cases are only useful where the facts are closely analogous, or the observations of the judges are applicable to the facts of this case. I shall first distinguish those cases in which patents have been held void, quoting a few short passages from each of them, to show that the facts were different, or that the *ratio decidendi* is not applicable.

In *Kay* v. *Marshall* (1) the patent failed, because the only variation which the plaintiff introduced into the ordinary spinning machine was an alteration in the distance at which the rollers were fixed, the mode of working being the same; therefore "the patent would have deprived the rest of the world of the right to use the ordinary spinning machine in the form in which they had a right to use it before the patent was granted"; but Lord Cottenham said that, "If the plaintiff had discovered any *means of using* the spinning machine which the world had not known before, the benefit of that he had a right to secure to himself by means of a patent."

In *Losh* v. *Hague* (2), *Tatham* v. *Dania* (3), and *Brook* v.

(1) 5 Bing. N. C. 492; 5 Jur. 1028; 8 L. J., C. P. 261.

(2) 1 Webster, 202.

(3) Griff. Pat. Cas. 216.

Appeal 1894. PIRRIE v. YORK-ST. SPINNING CO. Fitz Gibbon, L.J.

Aston (1), the patents failed, because the plaintiffs only applied old machinery, in the old manner, to analogous subjects. In *Tatham* v. *Dania* (2), an old teasing machine was applied to waste material in the same manner in which it had previously been applied to raw cotton. Brook applied to yarns of wool or hair the same finishing machinery which had previously been applied in the same way to linen threads, producing only the same effect. The *Patent Bottle Envelope Case* (3) was decided on the same ground, the plaintiff having only applied a well-known instrument to work previously untried materials in the old manner.

In *Morgan* v. *Windover* (4) the patent failed, because the plaintiff only applied at one end of a carriage the same spring which had already been applied at the other, in the same manner and with the same result.

In *Tetley* v. *Easton* (5) the patent failed, because the plaintiff had only discovered that a particular advantage might be attained by the use of an old machine in a manner known before, and neither the form of the plaintiff's appliance, nor his method of using it, was new.

In *Bamlett* v. *Picksley* (6) the patent failed, because the plaintiff had only done a thing which had been done before, and done it in the identical way. He had "applied it to another purpose, no doubt," but he had taken "the identical thing which was known before," and the result was "completely the same thing that was done before."

Harwood v. *Great Northern Railway Co.* (7) has made the Chief Justice uneasy, and it comes nearer this case than any of the others in which the patents have failed. It is a striking illustration of the differences of opinion which arise in these cases. The Queen's Bench differed from the Exchequer Chamber, and the judges who attended in the House of Lords did not agree in the result. For our purpose the question is, whether does the result of the evidence as stated by Blackburn, J., or that stated by Channell, B., best fit the facts of this case? Blackburn, J., said:

(1) 8 E. & B. 478.
(2) Griff. Pat. Cas. 216.
(3) 5 C. B. (N. S.) 164.
(4) 7 R. P. C. 131.
(5) 2 C. B. (N. S.) 706.
(6) Griff. Pat. Cas. 41.
(7) 11 H. L. Cas. 654.

"We think we are to consider this discovery as producing an improved article, and as being useful, and also new, unless in so far as it was anticipated by the mode in which Mr. Brunel (the prior inventor) strengthened his bridges." He held that Mr. Brunel did not anticipate the plaintiff's discovery, because he used a channelled iron for the purpose of strengthening his bridge, by "placing it horizontally for the purpose of resisting vertical pressure," whereas the plaintiff's idea was "founded on the uselessness of the centre part of a plate placed vertically for the purpose of resisting vertical pressure," and its utility and novelty consisted in "removing useless or inert material." Channell, B., came to the opposite conclusion, because "the use of iron plates for fishes ungrooved was known; for strengthening timbers in bridges, and bolting them together, the use of iron plates grooved was known; and the special advantages, when so applied, of securing bolt-heads, and of affording equal strength with less material were also known." If I am right that the advantages of getting over the shrinkage, and producing the dry yarn on a "non-returnable" paper tube, were first obtained by Pirrie, Channell, B., would have decided in his favour. The farthest point to which the principle has been pushed is found in the judgment of the Exchequer Chamber: "A mere application of an old contrivance, in the old way, to an analogous subject, without any novelty in the mode of applying such old contrivance to the new purpose, does not make a valid subject-matter of a patent"; and I understand the Lords to have held that Harwood's patent failed, because his alleged invention consisted only in "fishing" rails with "iron plates bolted together, for the same purpose and in the same manner, as timbers had been previously strengthened by similar plates similarly bolted to them." If so, there was no new difficulty, and no new method of overcoming any old difficulty.

The cases in which patents have been upheld are more analogous; and several of them so closely resemble the present, in principle and in detail, that they deserve special consideration. I begin with the least important, using each as an example or an illustration, just as I have used the other cases as contrasts.

In *Kaye* v. *Chubb* (1), it was held that a useless and abandoned

(1) 5 R. P. C. 641.

Appeal 1894. PIERRIE *v.* YORK-ST. SPINNING CO Fitz Gibbon, L.J.

patent is not an anticipation of a subsequent invention, unless it not only describes the plaintiff's apparatus or appliance, but also describes the manner in which it is to be employed; and *Betts* v. *Menzies* (1), and *Neilson* v. *Betts* (2), are to the same effect. To constitute anticipation, the same difficulty, and the same method of meeting it, must appear in both inventions.

In *Penn* v. *Bibby* (3), a new application of an old and well-known thing was held to be patentable, because it was "not merely an application of an old thing to a new purpose," but "lay so much out of the track of the former use as not naturally to suggest itself to a person turning his mind to the subject," but "required some application of thought and study."

In *Young* v. *Rosenthal* (4), the issue of utility was found against the plaintiff by the jury, but the question of anticipation was left to the jury in terms which, in this case, ought, in my opinion, to be found in his favour. "The question is not whether stays"—in that case—vehicles for cops in this case—"were in existence before, and were useful, but are you satisfied from the evidence—and I am—taking them as what they were before, that there is anything in the plaintiff's invention which is more useful than the stays"—or vehicles—"people had before. If there is any new point of utility in the plaintiff's invention which was not in any previous known thing, then it is useful."

Bustles won in the House of Lords, though stays had lost in the jury-box. In the *American Braided Wire Case* (5), the House of Lords held, by a majority, that the application of a well-known elastic material to the new purpose of making bustles, by the use of old clamps fastened in a new method, was patentable, because it "must have been the result of thought and experiment," and "exhibited a degree of ingenuity sufficient to make it the proper subject of a patent," and "was not so obvious as to occur to every-one contemplating the use of braided wire for the purpose of a bustle." It will require more ingenuity than I possess to enable anyone who held the use of braided wire for bustles to be patentable under the circumstances proved in that case, to show that

(1) 10 H. L. Cas. 117.
(2) L. R. 5 H. L. 1.
(3) L. R. 2 Ch. 127.
(4) 1 R. P. C. 29.
(5) 6 R. P. C. 518.

Pirrie's use of the thin paper tubes in this case was not at least equally ingenious, equally novel, and more than equally useful.

Crane v. *Price* (1) was decided on principles very applicable, and under circumstances very analogous, to this case. A hot-air blast was used in the old way, but for the first time with anthracite coal, and so as to produce more, cheaper, and better iron from the same ore, and the patent was upheld. Pirrie produces better and cheaper cops, by so using old tubes that the natural and old process of drying produces a beneficial result in place of a difficulty.

In *Muntz* v. *Foster* (2) a jury found in favour of an invention which consisted in ascertaining by experiment that an alloy of zinc with copper, in proportions not previously used, would produce a sheathing for ships that resisted the natural action of the sea, or, rather, overcame the difficulty arising from marine growths, and Tindal, C. J., told the jury that "there was as much merit in discovering the hidden and concealed virtue of a compound alloy of metal as there would be in discovering an unknown quality which a natural earth or stone possessed." Is there any difference of principle in discovering by experiment that wet-spun flax will remain on a paper tube after drying, and that, by first mounting the paper tube on a rigid pirn, and then drying both together, they will afterwards separate in the natural process of drying, with the advantageous results proved here, and in discovering that weeds will not grow, or corrosion will not take place, on a ship's bottom, if it be covered with a certain alloy not used for that purpose before?

In *Hinks* v. *Safety Lighting Co.* (3) the plaintiff failed, because he had been completely anticipated, without his knowledge, by a previous patent; but Jessel, M.R., says: "Merit very much depends on the result produced. Where a slight alteration in a combination turns that which was practically useless before into that which is very useful and very important, judges have considered that, though the invention was small, yet the result was so great as fairly to be the subject of a patent; and as far as a rough test goes, I know of no better." Here thin paper tubes were use-

(1) 4 M. & Gr. 580. (2) 2 Webst. 96. (3) 4 Ch. Div. 607.

Appeal. 1894. PIRRIE v. YORK-ST. SPINNING CO. Fitz Gibbon, L.J.

less in wet spinning, until the plaintiff used them in combination with the rigid pirns, and turned them thereby to a very important and beneficial use.

Seed v. *Higgins* (1) establishes a principle of construction useful to the plaintiff here, on the objections to the form of his specification; and it shows that a claim to use or apply the natural agency of centrifugal force in a described manner, so as to produce a beneficial result, is good. It also lays down that where the question of novelty or infringement depends on the degree of similitude or difference between two machines, it is either a pure question of fact, or a mixed question of law and fact, and that in determining the fact the substantial question is, "whether the plaintiff's is a better invention than the defendant's?"

Hayward v. *Hamilton* (2) strongly supports the plaintiff, for though there was not "any great quantity of invention" in the plaintiff's "pavement prism"—no new instrument—and no new optical principle—the patent was upheld, because "the thing was never practised before," and the invention, though it was a combination of two old things, was useful in giving better light. Brett, L.J., says that, "In all previous cases it had been taken for granted that if the thing were new and useful there must have been an invention in order to arrive at it"; and he says that "In 999 cases out of 1000 that must be so, though it cannot be predicated as an absolute rule of law." This *a priori* evidence of inventive power or ingenuity exists here in a large measure. In fact it is supplied by the mercantile value of Pirrie's method.

In *Reynolds* v. *Amos* (3), the case of an invention for treating ensilage, this principle is stated: "If I take what are, upon authority, the requisites necessary to sustain a patent, I find that it is new, for it never was used before, that it is better than any other, and that it is, beyond all question, very much cheaper." Pirrie's use of their paper tubes stands all these tests.

There remain about half-a-dozen cases, which, from their importance, the closeness of their application, or the clearness of their statements of the law, seem to me to deserve examination in more detail.

(1) 8 H. L. Cas. 550. (2) Griff., 116, 121. (3) Griff., 201; 3 R. P. C. 215.

The first of these is *Otto* v. *Linford* (1). Jessel, M.R., says: —"Very little mechanical addition will do, if there is a new idea"; and again: "When the Judges are convinced that there is a genuine, great, and important invention, which, as in some cases, one might almost say, produces a revolution in a given art or manufacture, the Judges are not to be astute to find defects in the specifications." And again: "If you have a new principle, or a new idea, as regards any art or manufacture, and then show a mode of carrying that into practice, you may patent that, though you could not patent the idea alone, and very likely could not patent the machine alone, because the machine would not be new." Brett, L.J., says (p. 44):—"What is the rule when you rely only upon a description in writing as an anticipation? It is not sufficient to say that if a machine were made by a person who had read that writing, something in that writing would, if it had really been a machine used, have been, by reason of that user, an anticipation of the plaintiff's patent. You must go further, and you must show that a person conversant with such matters reading that writing would find in the writing alone a reasonably close description of the plaintiff's invention." There the plaintiff's invention was a gas engine, producing, by the introduction of a layer of air, a gradual expansion or explosion; and a prior specification described an engine, which it was proved would, if made, have produced that result; but it never had been made, and the result never had been produced. Here the plaintiff's invention is the introduction of thin paper tubes in combination with rigid pirns, producing a merchantable cop, sufficiently adhering to the paper tube after going through the drying process. The same might perhaps be said of Webb & Craig's specification that was said of the previous gas engine, viz. that a "base" might have been made according to it, which would, if made and dried, have been an anticipation of the plaintiff's method. Otto's invention was "the introduction, next to the piston, of a column or layer of air, after that a combustible mixture, and these being ignited, a gradual expansion was produced," and the machine that for the first time did this was held patentable and unanticipated. So,

(1) 46 L. T. (N. S.) 35.

Appeal. 1894. PIRRIE v. YORK-ST. SPINNING CO. Fitz Gibbon, L.J.

Pirrie introduced, between the rigid pirn and the wet flax, a thin paper tube, and these being dried, a separation of the rigid tube from the paper, without losing the adequate adhesion of the paper to the yarn, was produced, with advantageous results, mechanical and mercantile, not previously obtained. I think the cases are analogous, and the judgments in *Otto's Case* (1) very apposite. Holker, L.J., says:—"It may be that you make many improvements upon it; but if you only make a machine which, for the first time, produces a gradual expansion of gases, and thus gives the necessary motive power, you necessarily have a machine of some utility, and if it is a machine of some utility, that is enough." So here, Pirrie's tubes may not be perfect, but he has, for the first time, produced a useful result, by adopting a method of using thin paper tubes, sufficiently advantageous to drive all others out of the market. As to anticipation by a prior specification, the same judge says (p. 46):—"Unless the prior specification describe the invention of the plaintiff, there is no anticipation. There is a great difference between a specification which is relied on as an anticipation and a machine which is relied on as an anticipation. If you were to produce a machine which was made for a particular purpose, and which would accomplish, when used, results which were not thought of when it was made, were not anticipated, possibly the machine itself, without any user, would be an anticipation. I should doubt that very much myself. I do not find any authority upon it, one way or the other; but I think it is perfectly clear that the machine, if used so that the public could ascertain what it would effect, would be an anticipation. But this is quite a different thing from producing, as an anticipation, a specification; for one cannot tell, except from the language of the specification, what results the contemplated machine may accomplish. Do we gather from Johnson's (the prior) specification that he made, or intended to make, or dreamt of making, a machine in which the expansion of the gases would be retarded or would be gradual? On the contrary, his object seems to have been entirely different. His object seems to have been, by introducing a little layer of air, to make the explosions

(1) 46 L. T. (N. S.) 35.

more immediate and more perfect. He says so in so many words. Then how can you say that Johnson pointed out, or intended to make, an engine of this description, the main feature of which is the gradual explosion of the gases?"

Let me paraphrase these words of a judge, described by one of his colleagues as "having been engaged in nearly every patent case for twenty years, and therefore knowing a good deal more about this subject than I do." I ask—Do you gather from any of these prior specifications that the patentees made, or intended to make, or dreamt of making, a vehicle for a wet cop which would continue to carry it until the two parts of the vehicle separated in drying, leaving the inner tube free for use again, and the thin paper tube remaining in the cop to go to the market or to the loom? I answer—On the contrary, their object seems to have been, by introducing the thin tube, to make its separation from the spindle more immediate and more perfect, and to leave it and the yarn to go together through all the subsequent processes, without any further separation, and without any reference to the effects of drying. They all say so in so many words. Then how can you say that they pointed out, or intended to make a vehicle, the main feature of which is the postponement of the separation of the two tubes after they have both left the spindle, until both together have been put through the drying process? I think the cases are closely analogous, and that, on the reasoning of the judges in *Otto's Case* (1), Pirrie's invention was not anticipated by any of the prior specifications, and also was novel in itself, and not a mere transfer of an old instrument to a merely analogous use.

The language of Lindley, L.J., in *Lane-Fox's Case* (2) is perhaps the strictest against inventors to be found in any of the authorities; but in *Moser* v. *Marsden* (3) he quotes and explains it. He there says:—"I cannot explain my view of the law more clearly than I did in *Lane-Fox's Case* (2), and as I took great pains with the wording of that, I will read it: 'A man who discovers that a known machine can produce effects which no one before him knew could be produced by it, may make a great and

(1) 46 L. T. (N. S.) 35.

(2) [1892] 3 Ch. 424; see 8 R. P. C. 277; 9 R. P. C. 221, 413.

(3) 10 R. P. C. 358; 9 *Times'* Rep. 584.

Appeal. 1894. PIERIE v. YORK-ST. SPINNING CO. Fitz Gibbon, L.J.

useful discovery; but if he does no more, his discovery is not a patentable invention. He has added nothing but knowledge to what previously existed. A patentee must do something more; he must make some addition, not only to knowledge, but to previously known inventions, and must so use his knowledge and ingenuity as to produce a new and useful thing or result, or a new and useful method of producing an old thing or result. On the one hand, the discovery that a known thing—such, for example, as a Planté battery—can be employed for a useful purpose for which it has never been used before, is not alone a patentable invention; but on the other hand, the discovery how to use such a thing for such a purpose will be a patentable invention, if there is novelty in the mode of using it, as distinguished from novelty of purpose, or if any new modification of the thing, or any new appliance, is necessary for using it for its new purposes, and if such mode of user, or modification, or appliance, involves any appreciable merit. It is often extremely difficult to draw the line between patentable inventions and non-patentable discoveries, but I have endeavoured to state the distinction as I understand it, and so far as is necessary for the purposes of the present case.' "

This is very careful language, no doubt, of the highest authority; but the distinction taken is very subtle, and the difficulty still lies in the application. With all humility, I venture to think it is quite possible that the inexhaustible chapter of futurity will yet disclose a case that will show that even Lindley, L.J., has added one more to the list of failures to lay down complete definitions, or rules of general application, *beforehand*, for distinguishing classes of things between which there is no natural or real difference. For example, take two theoretically possible results, yet unattained, but at which ingenious people are daily aiming—converting carbon into diamonds, or reproducing colours by photography. Any one who could find out a means of doing either would surely produce a "new and useful result." At least, he would make his fortune by a new method of producing diamonds or colours. I am not prepared to say, beforehand, that if he produced the effect by using "a known machine," such as any particular galvanic battery, or by a peculiar use or application of electric force, or even of light or heat, or by employing a known chemical

agent, he could not patent his method, even though he had "added nothing to what previously existed" beyond the "knowledge" that known things, used in a new way, would produce results not known before. Of this I am certain, that if anyone hereafter succeeds in crystalising carbon, or producing coloured photographs, he is just as likely as not to do so by a process or a method of which it will be impossible to say whether it is best described as a "discovery" or as an "invention," as those terms are used by Lindley, L.J. Either one or the other may equally involve knowledge, patience, study, investigation, experiment, and every other condition and quality of the most meritorious "ingenuity."

But for the purposes of the present case, it is enough to apply Lindley, L.J.'s own language. Pirrie has discovered how to use paper tubes for a purpose to which they were not applied before, and there is novelty in his mode of using them, and his mode of user involves appreciable merit. He is within Lindley, L.J.'s lines as laid down in *Moser* v. *Marsden* (1), where *Lane-Fox's Case* (2) is explained. "Ingenious modifications based upon a new idea are necessary; and such necessity is *all that is required*, to prevent the plaintiff's patent from being open to the objection that it is, after all, only a patent for a new method of using an old machine." He says, speaking of a prior patent: "Jahr (the prior inventor) indicated with great clearness the mechanical end to be attained, and he showed one method of obtaining it. But without modifications based on a new idea, Jahr's machine cannot be made to produce the various results which render the plaintiff's patent superior to all its rivals." Here the plaintiff's patent is based on the idea of so using the composite base in the several stages of wet spinning, as to produce results so advantageous that the plaintiff's modifications of the old appliances, and changes in the way of using them, are driving "all his rivals" out of the market; and this idea never occurred to any of the prior patentees. In *Moser* v. *Marsden* (1) Lindley, L.J., sustained the plaintiff's patent, because "by none of the previous patents could a machine be produced which would give such a control over the relative

(1) 10 R. P. C. 358. (2) [1892] 3 Ch. 429.

Appeal. 1894. PIRRIE v. YORK-ST. SPINNING CO. Fitz Gibbon, L.J.

velocities of the operating parts as would enable it to do all the work required by it." So here the plaintiff's method gives such a control over the effects of wetting and drying on the pirn, the paper, and the yarn, throughout the wet-spinning process, as enables the cop to reach the end of the process in a better shape for the market, or for use in the shuttle, than had ever been attained before. Smith, L.J., in the same case, deals appositely with arguments based on previous patents that have lain for years useless or unused in the Patent Office, or that were intended to attain different objects, or to be applied in different ways, but which never were applied to produce the beneficial result claimed, and for the first time attained, by an inventor. He says (p. 362): "This kind of argument begs the whole question, namely, whether a new and different thing, of practical utility, has or has not been brought about by the application of inventive genius?" I believe that the plaintiff's use of thin paper tubes is a new thing of practical utility, and I cannot deny him some degree of inventive genius in working out his idea. Even the language of Lindley, L.J., in *Lane-Fox's Case* (1) itself, when paraphrased, will uphold Pirrie's patent. I think the plaintiff here "did more than discover" that thin paper tubes can be usefully employed for wet spinning, for "he has shown how, practically, the desired result can be obtained, which no one knew before, and he has used his invention as described, so as to produce that result." He has "done more than indicate the direction in which further progress may be expected, because his invention is useful for its purpose." "He has overcome difficulties, and he has obtained practically useful results." I too "have studied the whole evidence, with all the care I can bestow upon it, and have come to the conclusion that the plaintiff has invented what he says, viz. 'a practical method' of using thin paper tubes with mercantile advantages, and by means amounting to a new invention, as described in his specification."

The decision in *Gadd* v. *Mayor of Manchester* (2) is an analogous application of the same principle. There, previous patents disclosed "inventions and arrangements" which, in the opinion

(1) [1892] 3 Ch. 429. (2) 9 *Times'* Rep. 42.

of Lindley, L.J., were "undistinguishable in principle from those described by the plaintiffs in their specification," and the following propositions, which were deduced in that case, by that most eminent judge, from the innumerable decisions, as applicable to that case, seem to me to be at least equally applicable here:— "1. A patent for the mere new use of a known contrivance, without any additional ingenuity in overcoming fresh difficulties, cannot be supported. If the new use involves no ingenuity, but is in manner and purpose analogous to the old use, although not quite the same, there is no invention. 2. On the other hand, a patent for a new use of a known contrivance is good, and can be supported, if the new use involves practical difficulties, which the patentee has been the first to see and overcome by some ingenuity of his own. An improved thing, produced by a new and ingenious application of a known contrivance to an old thing, is a manner of new manufacture, within the meaning of the statute. Under which of these rules any particular case falls, depends on its own special circumstances, and is often a question of very great difficulty, giving rise to considerable difference of opinion, but the rules themselves are intelligible enough. Their application involves a correct estimate of the degree of ingenuity which amounts to invention." I come here to the same conclusion at which Lindley, L.J., arrived there, viz. the conception of the idea of applying the arrangement is, no doubt, the principal merit of the plaintiff's invention; but if there is also, as I think there is, considerable ingenuity in carrying out the idea, and in applying the idea to wet spinning, the case is brought within the second rule, and does not fall within the first. The plaintiff has made a new and useful thing, viz. an improved vehicle for wet-spun yarn, "and however obvious his invention may now seem, it was not at all obvious until he hit upon it."

Cannington v. *Nuttall* (1) is also very analogous and important. No doubt Lord Westbury says, p. 227, that "The apparatus, the machine, the combination of the separate parts, is the subject of the invention, and of course constitutes the merit of the discovery"; but he says: "The patentable invention consists in the

(1) L. R. 5 H. L. 205.

Appeal. 1894. PIRRIE v. YORK-ST. SPINNING CO. Fitz Gibbon, L.J.

construction of the apparatus in such a manner as to bring the natural agency or power to bear upon and effect the object desired, and the patentee does that by means of an apparatus constructed so as to bring into action that natural power." There was nothing new in several parts of the apparatus there. I see no difference in the principle between the plaintiff's re-arrangement of the tank, flue, and furnace in that case, so as to use the natural agencies of heat and cold, in order to prevent the molten glass from escaping when a crack took place, and the plaintiff's arrangement of the several parts of the core here, so as to minimise the injurious effects, or overcome the difficulties, consequent on the natural agency of the drying process. I apply Lord Hatherley's conclusion (p. 216) to this case:—"The object of the invention was the applying of well-known principles to the achievement of a practical result not yet achieved, which was effectively obtained by means of the plaintiff's apparatus, whereas it had never before been effectively obtained by any of the separate portions of the apparatus which he had for the first time combined into one valuable whole, for the purpose of effecting the object he had in view. The invention itself was useful, and had not theretofore been applied, whatever may be said as to whether or not the various separate component parts of the invention had been known." Lord Westbury (p. 229) says the same:—"The merit of the invention lies in the improved furnace, constituted mainly of three integral parts" (none of which were new) "which are brought all into correlative action for the purpose of getting a better manufacture; and in the three taken together, and not in any one of the three taken separately, lies the utility, and lies the novelty, of the invention."

But after going through the multitude of cases, the upshot is as well put in Frost (p. 62) as anywhere else:—"The question whether a new use of an old appliance is competent to form the subject-matter of a valid patent must, in each particular instance, be answered in the affirmative or negative, according as invention and ingenuity are present or absent in the new application. It is obviously impossible to frame any rule which will serve as a guide to show at once whether any particular instance is one involving invention or not. The authorities are necessarily decisions on

particular cases, and are useful only as affording some guide to the decision of any particular instance coming under consideration. Each case must be decided on its own merits, and with reference to its own special circumstances. There may be an element of novelty in an alleged invention, and yet that novelty may consist only in the new occasion, or the new use, to which an old and well-known thing or method is applied. The principle—*i. e.* the method of operation or order of combination—of the alleged new invention may have been discovered and applied before, though not on precisely the same occasions and uses, or with the same materials. If the new application is nothing more than a double use, and shows nothing beyond the mere skill of a constructor in adapting a well-known method to different occasions, the patent cannot be supported. If there is no novelty in the effect produced, but the occasion only is new, then the use to which the known thing or method has been applied is simply analogous to what was done before; but *if the effect is new*, then the first application of the known thing or method may constitute the subject-matter of a valid patent."

I confess to a preference for old authority, and I doubt that the countless decisions of the present century supply a better statement of the law, or one more applicable to the present case, than Eyre, C.J.'s judgment in 1795, in *Bolton* v. *Bull* (1):—"Shall it now be said, after we have been in the habit of seeing patents granted in the immense number in which they have been granted, for methods of using old machinery to produce substances that were old, but in a more beneficial manner; and also for producing negative qualities by which benefits result to the public, that there can be no patent for a method producing this new and salutary effect, connected with the trade and manufactures of the country? Undoubtedly there can be no patent for a mere principle; but for a principle so far embodied and connected with corporal substances as to be in a condition to act, and to produce effects in any art, trade, mystery, or manual occupation, I think there may be a patent. Now this is, in my judgment, the thing for which the patent in this case was granted, and this is what the specification

(1) 2 H. Bl. 494.

Appeal. 1894. PIRRIE v. YORK-ST. SPINNING CO. Fitz Gibbon, L.J.

describes. It is not that the patentee has conceived an abstract notion, but he has discovered a practical manner of doing it, and for that practical manner of doing it he has taken his patent, not for a principle, but for a process."

When all is said and done, I find as a fact that Pirrie has, by study, experiment, and ingenuity, worked out a practical manner of carrying yarn through all the stages of wet spinning from the time it passes the eye of the flyer until it goes into the woven fabric. He has produced a "cop" which is, in a mercantile sense, better than any cop that was produced before. Nobody ever did the same thing before. The value of his improvement is proved and gauged by the money which traders are willing to pay for it; and as he was the first to produce a *thing*—whether it is to be called a result, a product, or a method, I care not—which is capable of driving all its predecessors and its rivals out of the market, he is, in my judgment, entitled to reap the fruit of his invention under the protection of his patent, and is therefore entitled to an affirmance of the Vice-Chancellor's decree, with costs.

BARRY, L.J.:—

It is much to be regretted, for the sake of our country, that we have in the Courts here so little practical experience in the administration of patent law and the application of its principles. As evidence of this state of things, I may state the fact that this is only the third occasion, during the many years I have been on the bench, in which a patent case has ever been submitted to my judicial consideration. On the other hand, in England, as the necessary outcome of its exhaustless activity in commerce and manufacture, and the vast and varied fields which it affords for industrial enterprise, the law of patents constitutes a distinct, extensive, and most important branch of our jurisprudence, attracting to it largely, sometimes almost exclusively, the study, attention, and advocacy of most eminent members of the bar, having attached to it a special class of practitioners, known as patent agents (who require and possess the most varied knowledge and acquirements), and having for itself a special literature, which, in very voluminous tomes, records patent cases independently of the

volumes in which the ordinary decisions of our tribunals are reported. In the vast multiplicity of cases which have come before the English Courts, with their ever varying and wholly dissimilar subject-matters, with the subtle considerations presented by the evidence in each particular case, it is impossible not to expect decisions not easily, if at all, reconcilable with each other, decisions and dicta capable of being relied on in argument, on either side, in support of antagonistic propositions. Referring to that prolific source of litigation, the impeachment of the validity of a patent on the ground of want of novelty, or inadequacy of subject-matter, that eminent judge, Lord Justice Lindley, says in *Lane-Fox's Case* (1) :—"It is often extremely difficult to draw the line between patentable inventions and unpatentable discoveries." I do not think, however, that such divergent decisions can be accurately designated as "conflicting." What I understand by conflicting decisions are cases where on the same, or practically the same, facts, the conclusions of law arrived at are antagonistic. The principles of patent law referred to in the argument before us are indisputable. As regards the questions most largely discussed, namely, the questions of novelty and subject-matter, the principles relied on by the defendants as being expressed most adversely to the plaintiff's claim, were cited to us from the judgment of Lord Justice Lindley in *Lane-Fox's Case* (1). I have the report before me, and intended to have read the passages relied on; but as they have been read by my brother Fitz Gibbon, I shall not occupy time by repeating the operation. These passages include in their scope, doubtless, the doctrine of "analogous use," so frequently and so strenuously pressed on us by the counsel for the defendants in their able arguments, but they are not inconsistent with a qualifying principle of this doctrine of "analogous use" which is to be derived from the authorities referred to by the Chief Justice and my brother Fitz Gibbon, namely, that if the new use of the old appliances is not a *mere* adaptation, but requires and displays ingenuity and invention, and is really novel and useful, it may be patentable. Of course reliance was strongly placed for the defendants on the important case of *Harwood* v. *Great Northern Railway*

(1). [1892] 3 Ch. 429.

Appeal. 1894. — PIRRIE v. YORK-ST. SPINNING CO. — Barry, L.J.

Co. (1), which is a case strongly illustrating the nicety of the questions arising in patent law, and showing how the same facts may strike in different ways minds of the ablest and most experienced men. A principal question in that case was, substantially, whether the plaintiff was not claiming a patent for a mere application of an old contrivance to an analogous use. The Court of Queen's Bench held the patent good; the Exchequer Chamber reversed that decision; on appeal to the House of Lords the judgment of the Exchequer Chamber was affirmed, but the judges who were called in differed in opinion. I think that the decision of that case, either in the Exchequer Chamber or the House of Lords, does not exclude the qualification to which I have referred of the principle of "analogous use." The head-note of that case in 2 B. & S. 194, is "Held by the Exchequer Chamber, reversing the judgment of the Queen's Bench, that the alleged invention was a mere application of an old contrivance in the old way to an analogous subject, *without any novelty or invention in the mode of applying such old contrivance to the new purpose*, and therefore was not a valid subject-matter for a patent." Passing over the judgments in the Queen's Bench, which were all in favour of the patent, we find at, 2 B. & S., 228, Mr. Justice Willes, delivering the judgment of the Exchequer Chamber, saying: "On the other hand, if the application of such grooves in pieces of iron so used had previously been made for a purpose the same as, or analogous to, that for which the patentee applied such grooves, *and there was no novelty or invention in the mode of applying the old contrivance to the new purpose*, such application, though useful, and made by the patentee for the first time, in this particular instance, would not be an invention for which a patent could lawfully be granted, or, being granted, could be sustained." In the report of the appeal in the House of Lords, at p. 667, Mr. Justice Blackburn says: "And we quite agree with the Court of Exchequer Chamber that a *mere* application of an old contrivance in the old way to an analogous subject, *without any novelty or invention in the mode of applying such old contrivance to the new purpose*, is not a valid subject-matter of a patent. There are many decisions

(1) 2 B. & S. 194; 11 H. L. Cas. 654.

to that effect. . . . But then in every case arises a question of fact, whether the contrivance before in use was so similar to that which the patentee claims, that there is no invention in the differences, if any, between the old contrivance and that for which the patentee claims a monopoly; and if there is none, there arises a further question of fact, viz. whether the purpose to which the contrivance was before applied, and the new purpose, are so analogous or cognate that there is no discovery or invention in the new application? Whether, in short, it is a *mere* application or not? For if there is invention or discovery, producing a practical benefit, as in the case of *Crane* v. *Price* (1), it is the valid subject of a patent." At p. 673, Mr. Baron Channell, delivering his opinion against the patent, says: "The law is correctly laid down in the judgment of the Exchequer Chamber, to the effect that 'a *mere* application of an old contrivance in the old way to an analogous subject, *without any novelty in the mode of applying such old contrivance to the new purpose*, does not make a valid subject-matter of a patent.'" At p. 682, Lord Westbury, whose judgment was so much relied on by the defendants, says: "You cannot have a patent for a well-known mechanical contrivance *merely* when it is applied *in a manner* or to a purpose which is not quite the same, but is analogous to the manner or the purpose in or to which it has been hitherto *notoriously* used"; and his Lordship expressed his approval of the doctrine established by the decisions referred to in the opinions (of the four judges) announced by Mr. Baron Channell. At p. 684, Lord Cranworth, in deciding against the patent, says: "It is the *mere* application of an old contrivance in the old way to an analogous subject, *without novelty in the application.*"

I am of opinion that this case of *Harwood* v. *The Great Northern Railway Co.* (2), so much relied on for the defendants (the authority in law of which cannot be questioned), is open to the observations which I made respecting *Lane-Fox's Case* (3), namely, that it is not inconsistent with, if it does not support, the proposition that though the subject to which the old contrivance is applied is, in a sense or to a degree, analogous, *e.g.* as here, the spinning of thread; yet, if the mode of the application involves

(1) 4 M. & G. 580. (2) 11 H. L. Cas. 654. (3) [1892] 3 Ch. 429.

Appeal. 1894. PIRRIE v. YORK-ST. SPINNING CO. Barry, L.J.

and displays ingenuity and invention, producing a result novel and useful, it can constitute a proper subject-matter for a patent. In the case before us the paper tube long known in cotton spinning, and the plaintiff's paper tube, introduced by him into wet spinning, are employed, in one sense, in an analogous use, namely, the twisting of thread in machines practically similar in principle; but the question is, whether the plaintiff's mode of using his tube in the wet flax spinning does not possess and display those characteristics of ingenuity and invention which are required to render it, and if present can be held to render it, patentable; and I think it does. The case was argued upon the system which seems to be common in England, namely, by examining in detail the facts of each case relied on, and contending that as the decision in that case was, *on its facts*, so-and-so, and as the facts of the case before the Court present a direct or argumentative resemblance to the facts of the case cited, there must, as if it were a question of law, be the same decision in the case before the Court, without any regard to the circumstance that evidence on a question of fact may operate differently on different minds. Such a method of arguing is not unknown to us in Ireland, perhaps in an exaggerated form, in other branches of law, and seems very nearly within the criticism of Lord Halsbury in *The London Joint Stock Bank* v. *Simmons* (1), where, at p. 208, he says:—"If, as I believe, it be accurate that the question is one which is to be determined upon the facts of the case, no one case can be an authority for another"; and, at p. 210, he says:—"I must make a protest that it is not a very profitable inquiry whether one case resembles another in its facts." But however that may be, whether, having regard to the difference of the subject-matter, the language of Lord Halsbury be or be not applicable, it cannot be disputed by anyone capable of appreciating the distinction between questions of law and questions of fact, that as regards this question of "analogous use," so much pressed on us, no rule can be framed which can determine at once whether, in any particular case, there is present invention and ingenuity, as distinguished from *mere* analogous use. As Mr. Frost says in his useful book, each case must be decided on its own

(1) [1892] A. C. 208.

facts and circumstances. Of course, I do not mean to say that the decisions of experienced and able judges, versed in dealing with such subject-matters, are not useful in guiding us to the weight to be given, or the importance to be attached, or the appreciation to be awarded, to particular facts or evidence, or absence of evidence; but, when all is said, every question of fact must be decided according to the impression made by the evidence on the mind of the tribunal charged with the duty and responsibility of deciding. It is not easy to accept as logical the argument that because, in *Morgan* v. *Windover* (1), the House of Lords (reversing the Court of first instance and the Court of Appeal) held a patent for changing to the front springs formerly used at the back of carriages to be void, therefore we must hold that the plaintiff's patent for using in wet flax spinning a paper tube such as was previously used only in dry cotton spinning is void. The principles of law applicable to each of the two cases are identical; all else is question of fact.

The case was argued before us with great ability on both sides, and I think it just to refer to the terse and pointed argument of the plaintiff's junior counsel, Mr. Bates. It was argued at very great length for several days on the part of the defendants, and possibly it would have lasted much longer if their senior counsel had allowed free scope to the zeal and industry of their learned and intelligent junior, who supplied them, as from a perennial fountain, with authority after authority, in a stream apparently exhaustless. After the exhaustive judgments delivered by the Lord Chief Justice and my brother Fitz Gibbon, I have no intention of attempting to emulate or imitate them in a detailed review of the voluminous evidence, or an examination of the very, very many cases which have been cited and discussed. For me to adopt such a course would be an idle, I may say impertinent, waste of the public time, which, in the present state of our list, is of great value indeed. I therefore confine myself to stating very briefly, and in a very general way, my concurrence in the conclusion at which they have arrived. I am of opinion that the plaintiff's invention or discovery, or whatever it may, *a priori*, be designated,

(1) 7 R. P. C. 138.

Appeal. 1894.

PIRRIE v. YORK-ST. SPINNING CO.

Barry, L.J.

is not a *mere* application of an old appliance to a new use, but is characterized by, and possesses the qualities of, ingenuity and invention, is useful and is novel in fact, and, on the whole, of such a character as to constitute a good subject-matter for a patent. Before Pirrie's invention wet yarn was, in spinning, wound round rigid pirns. Dry yarns, *e.g.* cotton, were wound on flexible paper tubes. In the drying process, necessary in wet spinning, the rigid pirns shrunk away inwards from the yarn, and the yarn stretched outwards, and thus the yarn became loosened round the pirn. The difficulty was met in some cases by screwing the rigid pirn up into the yarn. Pirrie conceived the idea of producing a cop of flax wet-spun yarn, which, when dry, would resemble, as far as may be, a cop of dry cotton, and would be mounted on a cheap flexible tube, such (as nearly as possible) as the paper tube on which the cotton was wound directly in the spinning-room, and which was not (in cotton spinning) subjected at all to the drying-room process. In working out this idea he discovered by experiment that if a flexible paper tube, the same as the cotton tube, was in wet spinning placed over the rigid pirn in the spinning-frame, and the wet yarn wound round the paper tube and pirn thus combined, then, when the cop, the paper tube, and pirn were all removed together to the drying-room, the wet yarn outside, the tube next, and the pirn the inmost, the rigid pirn shrunk away inwards from the paper, the paper shrunk outwards with the yarn, *and the yarn remained on the paper*. There was a good deal of discussion as to whether "adhere" must be taken to mean "stick to," as if glued or gummed, or the like. I do not think that such is the fair interpretation of the specification. I think the specification is fairly satisfied if the yarn, after drying, does not loosen round the paper, but remains with it, as, or nearly as, the cotton yarn remains with its paper tube. The invention of the plaintiff consists, as I have already intimated, in the discovery by experiment (involving invention and ingenuity) that while the rigid pirn would shrink away from the paper, the dried paper and dried yarn would remain together, without the loosening which occurred in the old process of wet spinning. The utility consists in the fact that the yarn and paper remaining together after drying afford the advantages of cheapness, portability, and fitness to go at once

into the shuttle, which had previously only been attained in the case of dry-spun yarn. Then there is the additional advantage that the expensive rigid pirn has not, under Pirrie's process, to be sent from the mill to the weaver or purchaser of the yarn, at expense and risk of loss, but is merely sent from the spinning-room to the drying-room, and thence back again; but never leaves the mill. The novelty of apparatus (if that be necessary) consists in the use of a double base or core for the cop, consisting of the pirn covered by the paper tube, upon which, thus combined, the wet yarn is wound. There is doubt, on the evidence, as to whether the flax yarn adhered (in any sense of the word) more perfectly to the plaintiff's thin paper tube than to the rigid pirn as previously used. The balance of evidence seems that it did; and at all events the distinct process of screwing up the pirn into the cop was no longer necessary, and the occasional necessity to push in the paper tube was not so frequent or troublesome. The advantages of the plaintiff's plan in economy of time and trouble were admitted before us by the defendants counsel, and are established by the clear proof that the plaintiff's paper tubes are driving the rigid pirns out of the market, and that large manufacturers have paid considerable sums to the plaintiff for liberty to use the paper tubes in combination with the rigid pirn. As to the other patents relied on as "anticipations," none of them are really so, because the thin tubes which are specified by the previous inventors, whenever they were made of paper, were used dry. Whenever they were used wet, they were necessarily made of metal or some other rigid substance, which would separate from the yarn in the process of drying, and would not meet the difficulty met by Pirrie. None of the previous patents dealt at all with the difficulty produced by the stretching of the yarn or the shrinking of the base in the process of drying. All of them contemplated the separation of the thin tube from the spindle in the spinning-room, and under none of them did any double base or case go from the spinning-room to the drying-room, to be there separated by the natural action of the drying process, with the consequential return of the rigid tube to the spinning-room, and transmission of the cheap thin tube with the dried yarn upon it to the purchaser or the weaver. In short, Pirrie, for the first time, produced a dried flax cop, as useful as

Appeal. 1894. PIRRIE v. YORK-ST. SPINNING Co. Barry, L.J.

the naturally dry cotton cop, on an equally cheap, portable, and convenient tube or base.

In these observations I only intend (as I have said) to indicate in a general and cursory way the views leading me to concur, as I do, in the judgments of my learned colleagues, and substantially for the reasons assigned by them for their conclusion. I think with them that the plaintiff's invention is novel, is useful, is a good subject-matter for a patent, and has not been anticipated, and that the specifications are sufficiently formal and adequate.

Another point has been raised and argued before us, namely, the alleged rejection of proffered evidence. On this point I have nothing to add to what has been said by the Chief Justice and my brother Fitz Gibbon. To dispose of such a point, under the circumstances, it ought to be enough to say that the objection is not even alluded to in the notice of appeal. But I wish to add that, in my opinion, to yield at such a stage of the case as this has reached, and under the circumstances, to such an objection, attended with such consequences, would be to throw upon the judge presiding at a trial a responsibility unjust and intolerable. It is a matter of every-day experience that at a trial where there is *viva voce* examination of witnesses—a question at first sight vague and seemingly irrelevant (as I think the questions here were) is asked. An objection is made and allowed. If no more is said, the question is regarded as practically withdrawn. But the counsel proposing the question commonly adopts (if the case admits) either of two courses, namely, he may satisfy the judge that the question is merely introductory to a line of evidence which is relevant and material, or he may undertake to make the answer to the question objected to evidence. On the judge being thus satisfied, the question is admitted; but it would lead to intolerable injustice, create vast uncertainty, and makes the rules of evidence mere snares, if, when the counsel, to all appearance, submits to the judge's ruling, he would then, in an appellate Court, be permitted to argue, on statements of what he could have proved, but did not offer to prove, that the vague and *prima facie* irrelevant question should have been admitted.

I have not arrived at the conclusion that the plaintiff's patent is good without doubt and hesitation, having regard to broad pro-

positions to be found emanating from high authority in cases cited to us. The case may, perhaps, be described as one *inter apices*, or, as the Lord Chief Justice has said, "near the border line" which separates affirmative from negative. I am not, too, perhaps, without some fear that I may have been influenced unconsciously in my mind by sympathy for the clever and modest young plaintiff, who, by his invention or discovery, whether patentable or not, has conferred a great monetary advantage on the important class of eminent men who carry on the great flax spinning industry of the North; and I have no sympathy with the great firm who are seeking to prevent his obtaining a reward for his services by the protection of a patent. But, heaven forbid that any case should be decided in this Court, or any Court, by sympathy or antipathy. If the law is with the defendants, they are entitled to have the benefit of it. I think the law is against them; and if I am wrong in that, I have the consolation of knowing that I err in good company—the Vice-Chancellor, the Chief Justice, and my brother Fitz Gibbon.

Solicitors for the appellants: *Crawford & Lockhart.*
Solicitors for the respondent: *W. & D. Johns.*

G. Y. D.

Monroe, J.
1894.
Feb. 6, 21,
23.
March 2.

IN THE MATTER OF THE ESTATE OF J. C. HURLEY, OWNER AND PETITIONER.

IN THE MATTER OF THE ESTATE OF F. E. BIDDULPH, OWNER; THE PROVINCIAL BANK OF IRELAND (LIMITED), PETITIONERS.

Equitable mortgage—Vagueness—Demand—Registration—Affidavit of execution by mortgagee only—6 Anne, c. 2.

1. Agreement by A with C, as follows:—"In case I fail to pay you any promissory note or bill of exchange of mine, when due, I agree to execute to you a mortgage on all my houses and lands, to secure to you the payment of all sums of money you may advance me on my promissory notes or bills of exchange, with interest, till paid, at such rate as may be provided by such promissory note or bill of exchange":—

Held, to create a valid equitable mortgage on lands, the property of A at the time of the agreement, for the amount of notes or bills remaining unpaid on maturity.

2. Agreement by B with C, as follows:—"In consideration of the advance this day made by you to me, I hereby agree that in case I fail to pay you any promissory note or bill of exchange of mine when due, I shall, upon demand, execute to you a mortgage on all my houses and lands, to secure to you the payment of all sums advanced, or to be advanced, by you to me on my promissory notes or bills of exchange, with interest, till paid, at such rate as may, in each case, be provided by such promissory notes or bills of exchange":—

Held, to create, without any demand, a valid equitable mortgage on lands, the property of B at the time of the agreement, for the amount of notes or bills unpaid at maturity, the words "on demand" having reference to the execution of a legal mortgage.

3. *Held*, following *Jack* d. *Rennick* v. *Armstrong* (1 H. & B. 727) and *In re Stephens' Estate* (Ir. R. 10 Eq. 282), that registration of a mortgage upon an affidavit verifying the execution of the instrument by the mortgagee only is defective.

MOTIONS to settle schedule of priorities.

In *Hurley's Case* a claim was filed by Thomas Joyce to be put upon the schedule on foot of an alleged equitable mortgage of which the following is a copy:—

To THOMAS JOYCE, 121, Stephen's-green, Dublin, Banker.

In case I fail to pay you any promissory note or bill of exchange of mine when due, I agree to execute to you a mortgage on all my houses and lands, and all future interest in houses or lands I may acquire, to secure to you the payment of all sums of money you may advance to me on my promissory notes or bills of exchange or otherwise, with interest, till paid, at such rate as may be provided by such promissory note, bill of exchange, or otherwise, such to be a collateral security, and without prejudice to your right to sue me for all such moneys and interest.

Dated 2nd January, 1891.

J. C. HURLEY, J.P.,
Waterbeach Vicarage, Cambridge.
Glenduff, Tralee, Co. Kerry.

I agree to the above.
THOMAS JOYCE.

The execution of the agreement and memorial by Thomas Joyce was witnessed by Henry Duffin and Arthur Eustace, and the instrument was registered in the Registry of Deeds office on the 6th January, 1891, upon the affidavit of Arthur Eustace, verifying the execution of the agreement and memorial by Thomas Joyce, but the execution by Hurley, the owner of the lands, was not verified for the purpose of such registration.

Dr. Scalfell and Miss Mitchell, incumbrancers on the lands under deeds, registered, respectively, on the 6th April, 1891, and 28th December, 1893, and who, admittedly, had not notice of Mr. Joyce's charge, objected to his being placed in priority to them.

Graves Cathrew, for Dr. Scalfell; and *The Right Hon. John Atkinson, Q.C.*, for Miss Mitchell:—

The instrument which the claim seeks to have placed on the schedule is neither a charge on land, nor a conveyance of land, and is incapable of being registered: *Cleary* v. *Fitzgerald* (1). It purports to charge all lands and houses the debtor might have anywhere. For the purpose of being placed on the registry, though it may not be necessary that the barony or parish where

(1) 7 L. R. Ir. 229.

Monroe, J. 1894.

In re HURLEY'S ESTATE.

the lands are situated should be mentioned in the deed, yet it is essential that the county should be stated: *Butler* v. *Gilbert* (1). Otherwise, where is search to be made? In *Dillon* v. *Costello* (2) the county was stated in the deed. The execution of the document by the grantor must be attested to admit of its being put upon the registry. This document amounts merely to an undertaking to execute a mortgage in events which might never occur: *Re Monsell* (3). The registration on an affidavit verifying Joyce's execution only is defective: *Jack* d. *Rennick* v. *Armstrong* (4); *In re Stephens' Estate* (5).

Wylie, for Mr. Joyce:—

Any agreement to execute a legal mortgage operates in equity as a charge on the lands. That it is conditional in form is immaterial. A legal mortgage in the same words would be effectual to secure the amounts of the promissory notes. Mr. Justice Madden in his treatise on the registration of deeds, states at page 68 (note), that doubt has been thrown on the proposition that the proof of the execution of the deed by the grantor is essential to a good registration. The final and effective signature to the document is that of Joyce. Until he signed, nothing was binding. Apart from the Registry Act a covenant like this creates a good charge as between the parties: *Cleary* v. *Fitzgerald* (6). As to the barony and county not being stated: see *Gardiner* v. *Blesinton* (7); Madden on Registration of Deeds, 62. The practice has been to admit documents of this kind to the registry.

In *Biddulph's Case* the Provincial Bank of Ireland mortgagees by registered deed claimed priority over two securities held by Mr. Joyce of earlier date.

One of these securities, dated the 2nd August, 1890, was *mutatis mutandis*, similar to that given by Mr. Hurley (*ante*, p. 489). The second was dated the 24th March, 1891, and was as follows:—

(1) 25 L. R. Ir. 230.
(2) 1 Jones, 410.
(3) 5 Ir. Ch. R. 529.
(4) 1 H. & B. 727.
(5) Ir. R. 10 Eq. 282.
(6) 7 L. R. Ir. 229.
(7) 1 Ir. Ch. R. 73.

Dated, 24th March, 1891.

To THOMAS JOYCE,
121, Stephen's-green, Dublin.
Banker.

In consideration of the advance this day made by you to me, I hereby agree that in case I fail to pay you any Promissory Note or Bill of Exchange of mine when due, I shall upon demand execute to you a Mortgage on all my Houses and Lands, and all future interest in Houses or Lands I may acquire, to secure to you the payment of all sums of money advanced or to be advanced by you to me on my Promissory Notes or Bills of Exchange, or otherwise, with interest, till paid at such rate as may in each case be provided by such Promissory Note, Bill of Exchange, or otherwise, such to be a Collateral Security, and without prejudice to your right to sue me for all such monies and interest. And I further agree, in case you have to mark judgment against me on foot of any Writ of Summons, issued to recover any of the monies above mentioned, you are to be entitled to interest on the money sought to be recovered under judgment, at the rate of sixty per cent. per annum, or such other rate as may in each case be provided by such Promissory Note, Bill of Exchange, or otherwise, instead of four per cent., and I authorize and agree to your issuing execution and levying for the money sought to be recovered under such judgment, and interest thereon at sixty per cent. per annum, or such other rate so as aforesaid provided by such Promissory Note, Bill of Exchange, or otherwise, from the date of said judgment till paid. And in the event of any such judgment being marked against me as aforesaid, I further promise and agree personally to secure, and upon demand to pay and make good to you such sum as may from time to time represent the difference between the interest on the money sought to be recovered under said judgment, calculated at the rate of four per cent. per annum, and the interest thereon calculated at the rate of sixty per cent. per annum, and I charge the amount of such sum as may from time to time represent such difference as aforesaid, on all my Houses and Lands, and all future interest in Houses and Lands I may acquire.

F. E. BIDDULPH,
St. Kilda, Parsonstown.

I agree to the above and foregoing agreement.
THOMAS JOYCE.

These instruments were respectively registered in the Registry of Deeds Office on the 6th August, 1890, and the 26th March, 1891, upon affidavits verifying the execution of them by Mr. Joyce only. Particulars as to the advances made by Mr. Joyce are detailed in the judgment of Mr. Justice Monroe, *infra*, p. 496, so far as material to the questions discussed.

Monroe, J. 1894. *In re* HURLEY'S ESTATE.

Kenny, Q.C., and *J. H. Moore*, for the Provincial Bank:—

There are two questions for argument. First, was the registration valid? Secondly, were these agreements charges on the lands?

First, as to registration. The preamble of the 6 Anne, c. 2, is different from that of the 7 Anne, c. 20 (Middlesex Registration Act). The Irish Act was aimed at the prevention of forgery. The object of the English Act was merely to secure publicity. The cases here proceed on the principle that the execution of which proof is contemplated by the Act is the substantial execution which passes the property, viz. that of the grantor: *Jack* d. *Rennick* v. *Armstrong* (1); *Reg.* v. *Registrar of Deeds in Middlesex* (2); Sugden's Vendors and Purchasers (11th Ed.) c. 22, s. 4; *In re Stephens' Estate* (3). In *Reg.* v. *Registrar of Deeds for the County of Middlesex* (4) Lord Justice Bowen points out what the object of the Middlesex Registration Act was, and shows that the decision of the Court of Appeal in that case did not conflict with the Irish authorities. Downes, C.J., states expressly (1 H. & B. 731) that the "execution of the grant or conveyance" in s. 6 means "the execution by the person whose sole act makes a complete execution."

As to the question of construction, there is only one agreement to be dealt with. The old note was given up in February, 1891. We rely on the arguments in *Hurley's Case*. It is only when a note is overdue that anything is to be done. What was to be done? The debtor was to execute a mortgage upon demand. It is only after the note is due and demand made that any effectual step can be taken. There was, therefore, no intention to give a present charge: *Williams* v. *Lucas* (5); *Berrington* v. *Evans* (6); *Mornington* v. *Keane* (7). There is no time fixed in the present case for doing the act: *Metcalfe* v. *Archbishop of York* (8). There the intention of the parties was to create an immediate charge. Here it is wholly different.

(1) 1 H. & B. 727.
(2) 1 El. & El. 322.
(3) Ir. R. 10 Eq. 282.
(4) 21 Q. B. Div. 555.
(5) 2 Cox Ch. Cas. 160.
(6) 3 Y. & Coll. Ex. 384. [317.
(7) 2 De G. & J. 292; see pp. 312,
(8) 6 Sim. 224; on appeal, 1 Myl. & Cr. 547.

[At the sitting of the Court on the 23rd February, *Kenny, Q.C.*, stated that, on inspection of certain documents sent up from the Branch Office at Parsonstown, the Provincial Bank admitted that when making the advance they had notice of Mr. Joyce's securities.]

Price, Q.C., and *Wylie*, for Mr. Joyce:—

An instrument very similarly worded was held by the Court of Appeal in Chancery to create a good equitable charge: *In re Parkinson's Estate* (1). In *Parker* v. *Housefield* (2) Lord Cottenham (then Master of the Rolls), said, at p. 420, that the light in which Courts of Equity view an equitable mortgage by deposit of title-deeds is as an imperfect mortgage which the mortgagee is entitled to have perfected, or rather as a contract for a mortgage which, according to the well-known doctrine of Courts of Equity, would give to the party claiming the benefit of such contract all such rights as he would be entitled to if the contract had been completed, and he then cites Lord Eldon's observations in *Ex parte Wright* (3). An immediate charge is given. That principle was adopted by the Court of Appeal in Ireland in *M'Kay* v. *M'Nally* (4); so in *Rolleston* v. *Morton* (5), Lord St. Leonards says, at p. 195, "If a man has power to charge certain lands, and agrees to charge them, in equity he has actually charged them; and a Court of Equity will execute the charge.

In *Ex parte Glyn*; *In re Medley* (6) the words were, "I engage, at any time when required by them" (the creditors) "to do so, to give them a valid and effectual mortgage on all my estates at Iver and elsewhere in Buckinghamshire," and this was held to be a good equitable mortgage. *Dighton* v. *Withers* (7) was a similar case. As to the instrument of the 2nd August, 1890, it is said that, as this was a contract to execute a mortgage in default of taking up the notes, there was no charge until there was a default. But the true meaning, having regard to the nature of the transaction, is that so long as the promissory note is current no legal

(1) 10 Ir. Jur. (N. S.) 82.
(2) 2 M. & K. 419.
(3) 19 Ves. 255.
(4) 4 L. R. Ir. 438.
(5) 1 Dr. & War. 171.
(6) 1 Mont. Deac. & De G. 29.
(7) 31 Beav. 423.

Monroe, J. 1894. *In re* HURLEY'S ESTATE.

mortgage shall be executed. In case of default the lender was entitled to have a legal mortgage, with power of sale, to enable him to realize without resorting to a Court, but the debtor is not to be put to any greater expense than the costs of the agreement in the first instance. It is described as a "collateral security." "Without prejudice to the right to sue" also indicates a concurrent security. What would be the use of an agreement to execute a mortgage if by reason of there being no security attaching on the property the debtor might alienate his houses and lands in the meantime? The intention suggested by the other side is an unreasonable one to attribute to the parties.

The instrument of the 24th March, 1891, is sufficient to convey what was secured by the preceding instrument. It is expressed to be made in consideration of a present advance. "When required" comes within the meaning of the cases already cited. As it is now admitted that the Bank had notice of Joyce's charges, they cannot be in a better position than Biddulph: *Eyre* v. *MacDowell* (1). They only acquired a charge on an equity of redemption. If Biddulph could not rely on the absence of a demand, neither can the Bank.

In *Williams* v. *Lucas* (2) no lands were mentioned in the security, and the debtor had no lands at the time. In *Berrington* v. *Evans* (3) no specific lien on any lands was given. It was a contract to charge some lands afterwards to be selected, and there a demand was necessary, in order that the lands to be charged might be ascertained. In *Mornington* v. *Keane* (4) no specific property was mentioned; it was impossible to know what property was intended to be charged. But, at p. 313, Lord Chelmsford says:—"Nor do I doubt that a covenant that particular lands shall be charged may, of itself, create a charge upon those lands, or (which is the same thing) that a covenant that all the lands which the covenantor shall have on a particular day shall stand charged, will create a charge without more. But it is not the same thing when the covenant is to do an act on a future day which will create a charge on some unspecified property." *Free-*

(1) 9 H. L. Cas. 619.
(2) 2 Cox Ch. Cas. 160.
(3) 3 Y. & C. Ex. 384.
(4) 2 De G. & Jo. 292.

mouth v. *Dedire* (1) is the foundation of these cases, and there the distinction is more clearly pointed out. Another test is to consider the rights of Joyce in an action for specific performance. Take the agreement of August, 1890. When the first promissory note fell due Joyce could sustain an action to compel Biddulph to execute a legal mortgage of all his houses and lands. So also with the second agreement. An action for its specific performance would lie as soon as a note became due, on the principle that an action can be brought on a promissory note payable on demand, so soon as it becomes due. The writ is a sufficient demand. What was to be demanded here was a legal mortgage. The document itself constituted an equitable charge on the lands immediately on the happening of the event on which it was to become a charge, namely, when the promissory note became due. The note was to be due before the subsequent mortgage was to be executed: *Ex parte Jones* (2); *Dighton* v. *Withers* (3).

If the second agreement never existed the first agreement would cover all advances up to the present. The second agreement was given to secure 60 per cent. on the judgment, having regard to the recent English cases. There is no evidence of an abandonment of the first agreement.

As to the question of registration, which still remained open in *Hurley's Case*, *Wylie* cited *Reg.* v. *Registrar of Deeds for the County of Middlesex* (4). As to the form of the document and its capability of registration: *Reilly* v. *Garnett* (5); *Cleary* v. *Fitzgerald* (6); *In re Hamilton's Estate* (7); *Gardiner* v. *Blesinton* (8).

J. H. Moore, in reply:—

The second agreement in *Biddulph's Case* relates to the same subject-matter as the first, and is between the same parties, and is in substitution for the preceding one: Chitty on Contracts (12th ed.),

(1) 1 P. W. 429.
(2) 4 Deac. & Chit. 750.
(3) 31 Beav. 423.
(4) 21 Q. B. Div. 555.
(5) Ir. R. 7 Eq. 1.
(6) 7 L. R. Ir. 229; judgment of May, C.J., pp. 241, 245.
(7) 9 Ir. Ch. R. 512.
(8) 1 Ir. Ch. R. 79.

Monroe, J. 1894.

In re HURLEY'S ESTATE.

p. 779; Leake on Contracts (3rd ed.), pp. 682, 683. The words "on demand" introduce a new term. It is impossible to rely on both agreements; they are inconsistent; and the rights of the parties are regulated by the latter. The term "on demand" rules this case, and distinguishes it from all the cases cited, except one, viz. *Dighton* v. *Withers* (1); and the report of that case is imperfect. It does not appear whether a demand was made or not. The case of a negotiable instrument is an exception to the general rule affecting promises conditional upon demand: Chitty on Contracts, p. 725; Leake on Contracts, p. 559. Even money payable on demand cannot be sued for until demand is made: *Ex parte Mare* (2); *Massey* v. *Sladen* (3); *Ex parte Lancaster Canal Co.; In re Dilworth* (4). The words "collateral agreement" plainly refer to a mortgage when executed. "Such" must refer to a legal mortgage. When the first note became due a mortgage might be required for all. In that case the word "collateral" would be most important. The decision in *Dighton* v. *Withers* (1) proceeded on quite a different state of circumstances. Before demand Biddulph was in no way tied up from dealing with the land. In *Metcalfe* v. *Archbishop of York* (5) there were words of present charge.

If an action for specific performance had been brought, a demand must have been proved.

March 2.

MONROE, J.:—

Both these cases come before me on motion to fix priorities. The points discussed were in some respects the same; but as there are several matters in which they differ, the material facts had better be separately stated.

In *Biddulph's Case* the Provincial Bank claimed to have priority over Mr. Thomas Joyce. It appears that on the 19th February, 1890, Mr. Biddulph, the owner, gave a bill of exchange for £200 3*s.* payable six months after date, and carrying interest at 60 per cent. On the 2nd August, 1890, before the bill became

(1) 31 Beav. 423.
(2) 8 Ves. 335.
(3) L. R. 4 Ex. 13.
(4) Montague, 27.
(5) 1 Myl. & Cr. 547.

due the owner gave a security in the following form. [His Lordship read the agreement of the 2nd August, 1890, see *ante*, p. 490.] On the 22nd August, 1890, the bill having become due, and not having been paid, a new bill was given for £260 17*s.* 6*d.* payable six months after date, and carrying the same rate of interest. This bill was not paid at maturity; but on the 24th March, 1891, a new bill was given for £353 9*s.* 5*d.* payable six months after date, also carrying interest at 60 per cent. When this bill was given, that of the 22nd August was handed back marked "settled by new note," a further sum of £300 4*s.* was advanced on the same day on another note; and a new security was given in the following form. [His Lordship read the agreement of the 24th March, 1891, *ante*, p. 491]. Further sums of £80 2*s.*; £120 2*s.*; and £200 4*s.* were subsequently advanced on the 22nd June and 30th June, 1891, and 24th March, 1892, respectively. All these sums were secured by similar promissory notes; and there is now alleged to be due £1054 12*s.* 11*d.* for principal, with £1602 3*s.* 7*d.* for interest up to the 31st December, 1893. The agreement of the 2nd August, 1890, was registered on the 6th August following; and the agreement of the 24th March, 1891, was registered on the 26th.

The owner was a customer of the Provincial Bank, and owed them a sum of £700 on foot of his current account, to secure which with 6 per cent. interest, he gave them a mortgage on the 18th October, 1892, which was duly registered subsequently. No further advance was then or subsequently made by the Bank. On the motion to fix priority instituted by the Provincial Bank, who had carriage, they treated Mr. Joyce as an incumbrancer, and placed his incumbrance puisne to their own; and they did so on these grounds:—1, That the entire of the sums advanced on and after the 24th March, 1891, were secured only by the agreement of that date, and not by the agreement of the 2nd August, 1890; and for this they relied on a letter of Mr. Joyce of the 25th January, 1894 (in reply to an inquiry by the Bank), stating that all the advances had been made under the last agreement; 2, That as the agreement of the 24th March was an agreement to execute a mortgage on demand, and as no demand was proved prior to the registration of the Bank mortgage the Bank must have priority;

Monroe, J. 1894. *In re* HURLEY'S ESTATE.

3, That the registrations of Mr. Joyce's two agreements were defective, inasmuch as the affidavit verifying the memorial did not verify the execution of the agreements by the owner, but only the execution by Mr. Joyce.

To this last argument Mr. Joyce replied that the Bank had notice of his agreement. Notice was subsequently admitted by the Bank, and, therefore, so far as this case is concerned, the point as to defective registration becomes immaterial.

In *Hurley's Case* the facts were these:—On the 6th January, 1891, Mr. Joyce advanced to the owner a sum of £158 10*s.* 5*d.* The interest payable was alleged to be 60 per cent. It did not appear by any affidavit that this sum was secured by a bill or promissory note; but an agreement in terms in all respects similar to that of the 2nd August, 1890, made with Mr. Biddulph, was executed on the 2nd January, 1891, and registered on the 6th January. It was contended on behalf of the owner and of two incumbrancers, whose charges were registered on the 6th April, 1891, and 23rd December, 1893, respectively: 1, That the instrument executed on the 2nd January, and registered on the 6th January, 1891, was too vague in its terms, as it did not specify any particulars as to the barony or county in which the lands were situated; and, 2, That the registration on an affidavit which did not verify the execution of the agreement by Mr. Hurley, the owner, must be held to be defective.

As regards the point made in *Hurley's Case* that the agreement is too vague, I am satisfied there is no validity in the argument. Both in this and in *Biddulph's Case* the lands now for sale were in the possession of the owner at the time when the respective agreements were executed. If a person mortgages or agrees to mortgage all his lands a charge is created in law or in equity on all the lands of which he is then the owner: and in registering an agreement, mortgage or conveyance, the memorial is only required to follow the description contained in the instrument: *Ex parte Glyn* (1). If there is an agreement to execute a legal mortgage from the date of the agreement, or, if the agreement specified a particular day on which, or a particular event after which, the

(1) 1 Mont. Deac. & De G. 29.

agreement is to operate, then when the date arrives or the event happens, the equitable charge arises. The cases relied on by the owners in opposition to this view do not, in my opinion, support the contention. In *Williams* v. *Lucas* (1) the contract was to give a security by mortgage of lands when required. There were no lands mentioned, and there were no lands in the ownership of the party contracting, at the time the contract was made. It was held that the contract was too indefinite to affect any lands in particular, and merely amounted to a covenant to do something at some future time. In *Berrington* v. *Evans* (2) the contract was that, if money due were not paid as promised, the debtor was to sell so much of his estates as might be found necessary for that purpose. In order to create the charge it became necessary to have the further act of specifying the lands to be sold. Therefore, I am clearly of opinion that if bills or notes were given under the form of agreement executed in *Biddulph's Case* on the 2nd August, 1890, and in *Hurley's Case* on the 2nd January, 1891, so soon as those bills or notes matured and remained unpaid the lands of the owner became subject to an equitable charge. It is argued, however, that in *Biddulph's Case* all the moneys advanced were advanced under the agreement of the 24th March, 1891, and that no security was created until a demand was made. I think those advances were made under the second agreement, which appears to have been substituted for the first; but I consider this makes no difference in the case. Under the second agreement, when the promissory notes were not paid at maturity, there was an equitable mortgage. The words on demand must be taken to refer to the execution of a legal mortgage. In *Dighton* v. *Williams* (3) there was a promise to execute, whenever required, a legal mortgage of certain leasehold premises. The Master of the Rolls held this constituted a valid equitable charge, without any proof that any demand or requirement had been made. Here it is admitted that the Bank had notice of an agreement with Mr. Joyce, and they must be taken to have known its contents. I am satisfied that Mr. Joyce in *Biddulph's Case* has priority over the Bank's charge, and the priorities in the schedule to the notice must be altered accordingly. The

(1) 2 Cox Ch. C. 160. (2) 3 Y. & C. Ex. 384. (3) 31 Beav. 423.

Monroe, J. 1894.

In re HURLEY'S ESTATE.

solicitors having carriage will have their costs as costs in the matter, and Mr. Joyce will have his costs with his demand.

In *Hurley's Case* no notice of Mr. Joyce's agreement was brought home to the mortgagees, whose charges were registered subsequent to his, and they are therefore entitled to raise the question as to whether Mr. Joyce's charge has been properly registered. This question arises on the construction of section 6 of 6 Anne, c. 2, by which it is provided "that every memorial so to be entered or registered shall be put into writing in vellum or parchment and directed to the register of the said office: and in case of deeds and conveyances shall be under the hand and seal of some or one of the grantors, or some or one of the grantees, his, her, or their guardians or trustees, attested by two witnesses, one whereof to be one of the witnesses to the execution of such deed or conveyance, which witness shall by affidavit to be made before the said register or his deputy who is hereby empowered and required to administer such oath, prove the signing and sealing of such memorial and the execution of the deed or conveyance mentioned in such memorial, and the day and time of the delivery of such memorial to the register or his deputy." In the present case the witness to the memorial proves the execution of the agreement by Mr. Joyce only; he does not prove the execution by the owner. Is this proof of the execution of the deed or agreement within the meaning of the section? The question came before the Court of Queen's Bench in the case of *Jack* d. *Rennick* v. *Armstrong* (1); and it was there held that where no act whatever of the grantor is testified it cannot be the execution of the deed intended by the law: the execution by the person whose sole act makes a complete execution must be what is meant by the execution of the grant or conveyance. The doctrine laid down by this decision was questioned by text-books of authority (9 Jarm. Conv. by Sweet, p. 683; Madden's Registration of Deeds, p. 68); but notwithstanding this, Judge Ormsby, in *Stephens' Estate* (2), decided in 1875 that *Rennick* v. *Armstrong* (1) should be followed.

No case on the construction of this statute has been cited in which these decisions have been questioned or contravened. A

(1) 1 H. & B. 727. (2) Ir. R. 10 Eq. 282.

similar point, however, was raised before the English Court of Appeal in the case of *The Queen* v. *The Registrar of Deeds for the County of Middlesex* (1). It arose on the construction of the statute 7 Anne, c. 20, sect. 5, a section similar in terms to the 6 Anne, c. 2, sect. 6.

The Court of Appeal, affirming the decision of the Divisional Court, held the registration to be good. The Irish cases were cited, with which, apparently, the judges were not quite satisfied, but they distinguished them on the ground that, looking to the preambles of the two statutes, the English Act was intended to secure publicity only, and therefore registration proving the execution of any one of the parties to the deed was sufficient, whilst the Irish Act was directed against forgery as well, and therefore proof of execution by the grantor was essential. They did not judicially differ from the Irish cases, and Lord Justice Bowen considered that, looking to the difference between the two preambles, the two decisions were not inconsistent.

Under these circumstances what am I to do in the case of *Hurley's Estate*? Where the construction of this section was decided by the Court of Queen's Bench very many years ago, where that decision was followed by my predecessor in this Court in the year 1875, and there is no contrary decision, am I at liberty to examine into the grounds on which the conclusion in these cases was arrived at? Sir George Jessel, when Master of the Rolls, expressed his opinion on this point in *Bellairs* v. *Bellairs* (2). "When I find a point decided," he says, "however I may lament the result, I think I am bound to follow the decision, and to construe it fairly, and not seek to evade it or fritter it away by introducing distinctions only invented for the purposes of pronouncing another decision, which, in my opinion, would be more in conformity with reason."

Mr. Justice Lawson, when sitting as a Commissioner of the Great Seal, took the same view in *Nixon's Estate* (3). He disapproved of a former decision of the Court of Appeal, but he added, "Though this be my opinion, I do not feel at liberty to act in opposition to a decision of this very Court, pronounced sixteen

(1) 21 Q. B. Div. 555. (2) L. R. 18 Eq. 513. (3) Ir. Rep. 9 Eq. 12.

Monroe, J. 1894. *In re* HURLEY'S ESTATE.

years ago, and I presume acted on since, and never questioned. If the present cannot be distinguished from that, we ought to follow it, leaving it to the House of Lords to correct it." Lord Justice Christian expressed himself to the same effect in the same case (p. 16). "I simply hold myself bound," he said, "by the clear, emphatic, and unequivocal announcement of the law made by so great an authority as Lord Justice Blackburne sixteen years ago, and ever since unquestioned and acted upon; and if the law, so laid down, is to be undone or overruled, I leave the task of doing so, if not necessarily to the Legislature, at all events to no less an authority than the Court of Supreme Appeal."

Following these decisions, I decline to enter into any consideration of the cases of *Jack* d. *Rennick* v. *Armstrong* (1); and *Stephens' Estate* (2). They are decisions of Courts of co-ordinate jurisdiction, and I take them to be right until a Court of higher authority says otherwise. Mr. Joyce is, therefore, not entitled to the priority which he seeks.

There is another point on which his claim seems to have been defectively put forward. No proof is given that the amount advanced to Mr. Hurley was secured by any bill of exchange or promissory note which has been since dishonoured. I apprehend, however, this is an oversight, and I shall give liberty to file an affidavit verifying such bill or note if it was given, and proving its dishonour or non-payment. On such affidavit being filed Mr. Joyce will be put on the schedule to the order as last incumbrancer, his incumbrance to be a charge only on the lands, and not on the annuity.

The solicitor having carriage will have his costs as part of his costs in the matter. Mr. Joyce must bear his own costs.

Solicitor for Mr. Joyce: *Treacy.*

Solicitor for incumbrancers and having carriage in *Hurley's Case: Norris Goddard.*

Solicitor for the Provincial Bank: *Tweedy.*

W. G.

(1) 1 H. & B. 727.

(2) Ir. R. 10 Eq. 282.

IN THE MATTER OF THE ESTATE OF J. J. HOGAN, OWNER AND PETITIONER.

Monroe, J.
1894.
June 15, 20.

Taxation of costs—Solicitors' Remuneration Act, 1881; *Gen. Ord.*, 1884—*Building lease—Scale of charges.*

1. Lease to a Race Committee of 135 acres, with a cottage thereon, for ninety-nine years, at the yearly rent of £237, with a covenant by the lessees to expend upon the premises within twelve months £1000, at least, in good and sufficient improvements of a substantial and permanent character:—

Held, not to be a building lease within the General Order, 1884, made under the Solicitors' Remuneration Act, 1881.

2. Lease of a large dwelling-house, offices, and garden of about an acre in extent, for ninety-nine years, at the yearly rent of £40, with covenants by the lessee to expend £300, at least, in good and sufficient improvements of a substantial and permanent character, and to keep the demised premises in good and substantial repair, with all buildings or fixtures thereon, and all gates, walls, and improvements then being or thereafter to be executed during the term. The walls of the house were sound, but the roof, floors, and ceilings were in bad condition, and would require, at least, the amount covenanted to be expended, and which the lessee proposed to expend thereon, to put the house in sound habitable repair:—

Held, that such lease was a building lease within the General Order.

3. In determining whether a lease is or is not a building lease within the General Order, regard must be had to the circumstances of the contract, the subject-matter of the demise, and the nature and extent of the expenditure to be made.

APPLICATION on behalf of the Messrs. Robinson, solicitors having carriage, for an order that the Taxing Master should review his taxation of the costs of preparing certain leases made under orders of the Court, one being to the Limerick Race Company, Limited, the other to Mr. Patrick Molony. The Taxing Master held, contrary to the contention of the Messrs. Robinson, that both were leases at rack-rents, and were not leases for building purposes, and taxed the costs of preparing them according to the lower scale in Schedule I., Part II., of the General Order, 1884, made under the Solicitors' Remuneration

Monroe, J. 1894. *In re* Hogan's Estate.

Act, 1881. The material provisions of the leases and the circumstances under which they were made are stated in the judgment of Mr. Justice Monroe.

As to the lease to the Race Company—

Shekleton, Q.C., for Messrs. Robinson:—

The question is whether these are to be considered building leases, and the scale of charges in the Order of 1884, Schedule I., Part II., relating to building leases or other long leases not at a rack-rent applies. In the Landed Property Improvement Act, 1860 (23 & 24 Vict. c. 153), "repairing leases" are included under the term "building leases." So in the Conveyancing Act, 1881 (44 & 45 Vict. c. 41, sect. 2, sub-sect. x.), building purposes include the erecting, improving, and repairing of buildings. Under the Settled Land Act, 1882, building leases may be granted in consideration of repairs or improvements. In the Settled Estates Act of 1858 (21 & 22 Vict. c. 77), building lease is defined to include repairing lease (sect. 2). The covenant by the Race Committee is to expend within one year £1000 in good and sufficient improvements of a substantial and permanent character. This excludes the idea that the outlay was to be in fencing or scouring ditches merely. Secondly, this is not a lease at a rack-rent.

[Counsel referred to the evidence on this point, the result of which is stated in the judgment.]

Bushe, Q.C., for the Limerick Race Company:—

The basis of the distinction in the schedule is the difference between an ordinary lease and what is practically equivalent to a sale. The existence of the covenant for improvements does not constitute a building lease. A building lease means a lease for building purposes. The only structure here to be erected was the pavilion or stand. The improvements contemplated were clearing gripes, erecting fences, &c. Improvement leases are well known, and are quite different from building leases.

Monroe, J.
1894.

In re
HOGAN'S
ESTATE.

As to the lease to Patrick Molony—

Shekleton, Q.C., for Messrs. Robinson :—

This is not merely a repairing lease. It is made for a long term. When a lease contains a covenant by the tenant to lay out a certain sum in permanent improvements, it is a building lease. *Smith* v. *Peat* (1) is an illustration of an ordinary covenant to repair. Improvements mean something in addition, in contradistinction to repairs.

Bushe, Q.C., for Mr. Molony :—

If this contention is to prevail, any tenant who takes dilapidated premises, and is bound to put them into repair, holds under a building lease.

MONROE, J. :—

June 20.

This is an appeal from the rulings of one of the Taxing Masters in reference to the costs of preparing two leases. Under the terms of the Solicitors' Remuneration Act, 1881, and the Rules made in pursuance thereof, two scales of charges for the preparation of leases have been approved. The first has reference to leases at a rack-rent, other than leases for building purposes. The second has reference to leases not at a rack-rent or to building leases. Messrs Robinson, the solicitors who prepared the two leases in the present case, claimed to be paid on the higher scale for both. The Taxing Master held that in both they should be paid on the lower scale.

One of the leases was made by John James Hogan and others to the Limerick Race Company, Limited. It was a lease of 135A. 0R. 16P., with a cottage thereon, for a term of 99 years, at a rent of £237, and it contained a covenant by the lessees to expend upon the premises, within twelve months, the sum of £1000 at least in good and sufficient improvements of a substantial and permanent character. It was contended that the lands were not let at a rack-rent, or if let at a rack-rent, that the lease was really a building lease. The lands were let under an order of this

(1) 23 L. J. Ex. 84.

Monroe, J. 1894. *In re* HOGAN'S ESTATE.

Court, after a great deal of negotiation. Before the rent was fixed it was referred to Mr. J. B. Barrington, a capable and competent valuator, to say what the sum should be, and after careful consideration he reported that the estate would be very fortunate if it secured the Race Company as tenants at £237 per annum. This was the sum agreed to, and I see no reason to doubt that this was the full value and best rent which could have been obtained. The valuation was made entirely irrespective of the covenant. Then, was this a building lease? Mr. Barrington, in his report, states that the lands were utterly unsuited for building purposes, and he gives his reasons. I cannot see, therefore, that the expenditure of £1000 in good and sufficient improvements of a substantial and permanent character could have taken the shape of buildings, or that the lessee was bound to build at all. There were many other ways in which the money could have been spent. In my opinion this was not a building lease, and I think the Taxing Officer was right in taxing the costs on the lower scale.

The second lease was made to a Mr. Patrick Molony. It was a lease of a dwelling-house, offices, garden, and pleasure-grounds. The term was 99 years, and the rent £40. There was a covenant on the part of the lessee to expend £300, at least, in good and sufficient improvements of a substantial and permanent character, and to keep all the demised premises in good and substantial repair, with all the buildings and fixtures thereon, and all gates, walls, and improvements then being, or thereafter to be, erected during the term.

It is not contended that the rent was not a rack-rent. That is admitted. The contention is that, having regard to the terms of the covenant, this is really a building lease. Before the lease was made, Mr. Barrington made a report in reference to the premises proposed to be included therein. He stated the premises consisted of a large brick dwelling-house, with garden attached, containing in all about one Irish acre. The external walls were, he said, good, but the roof, floors, ceilings, &c., were in very bad condition. It would take £800 to put the house in thorough repair, and unless some steps were taken to repair the house it must, in his opinion, in the course of a few years become a ruin. Mr. Barrington also

stated that the intended lessee had pointed out the works which he proposed to execute, and that if £300 were spent on the house it would make it sound and habitable for many years. It is manifest, therefore, that any expenditure which was to be made should be upon the house. There was nothing else on which it could be made. Is this, then, a building lease, having regard to the covenants? Mr. Shekleton referred me to the definitions of a "building lease" in the statutes 23 & 24 Vict. c. 153; 44 & 45 Vict. c. 41; 45 & 46 Vict. c. 38. These, however, are definitions for the purposes of the particular Acts which deal with powers given to limited owners and to mortgagees or mortgagors in possession. I do not consider myself bound to accept these definitions (which undoubtedly include "repairing leases" under "building leases") when I am construing the rules made under another statute, which contains no such definition. I must look at the whole of the circumstances of the contract, the subject-matter of the demise, and the nature and extent of the expenditure, to enable me to say whether this can properly be called a building lease. I find that the subject-matter of this lease is to all intents and purposes merely a dwelling-house and offices, that the house is almost in ruins, that there is hardly anything left standing except the outer walls, that the roof is gone, the ceilings are gone, and the floors are gone, and I fail to see why the restoration of these important and necessary parts of a house is not to be called "building" as well as the erection of the outer walls from the foundation. There is to be the expenditure of a sum equal to between seven and eight years' rent, and something, therefore, very like the construction of a new dwelling.

I am of opinion this is a building lease, and that the Taxing Officer ought to have taxed on the higher scale. The case must be remitted to him for this purpose.

Solicitors having carriage: *Robinsons.*
Solicitor for the lessees: *Hall.*

W. G.

Probate.
1894.
June 19.

WOODROOFE *v.* CREED.

Will—Execution—Unattested codicil—Subsequent codicil not referring to prior codicil.

A testator drew a will in his own handwriting. He signed it, and then added something to it, in which he referred to what was written above as his "last will." He subscribed the addition by again writing his name. He then summoned two witnesses into the room, who saw the paper there, signed with the two signatures. The testator acknowledged his signature in their presence. According to the evidence, in doing so, he pointed to the upper signature, and directed the witnesses to sign their names in the space opposite the first signature. Testator subsequently executed a codicil (duly attested) in these terms—"By this codicil to my last will and testament I leave and bequeath to my nephew F. C. . . . the sum of £7 sterling":—

Held, that the first and third parts of the document (excluding the second) constituted the last will of the testator.

ACTION, tried before the Court without a jury.

The facts material for the purposes of this report are stated in the judgment.

Ronan, Q.C., and *H. D. Conner*, for the plaintiff.

D. M'C. Mahony, for the defendant.

THE PRESIDENT:—

That this testator was not a professional man is apparent on the face of the will itself, there being no attestation clause. The names of the witnesses are given, with the words "witnesses present," but the circumstances of the attestation are not stated. At the time of the execution of the documents he was living in the house of a Mrs. Wall, one of the witnesses who has been examined. He appears, on or before the 17th August, 1891, to have drawn the will in his own handwriting. He signed it, and then added something to it, in which he referred to his "aforesaid last will and testament," that is, he refers to what was written above the

signature as his "last will." He then subscribed what he had added, by again writing his name and the date; and the document being in that state, he procured the attendance of his landlady Mrs. Wall and her daughter Sarah Wall. They came into the room, and saw this paper there, signed with two signatures. The evidence satisfies me that everything now appearing on the first page of the paper, except the names of the two witnesses and the interlineations, was written previous to the time the two witnesses came into the room. He acknowledged his signature in their presence, which is a good execution under the statute. He said: "This is my will; that is my name, Henry Creed," pointing to it. There is sufficient evidence to satisfy me, first, that when he pointed to the document he pointed to one signature, and not to both, that he did not point to the lower signature, but to the upper one; and, secondly, that he directed the witnesses to sign their names in the space opposite the first signature. I have arrived at that conclusion on the evidence as a juror. Upon the authorities which have been cited at both sides, to which Mr. Ronan has been so good as to refer me, it is quite settled that it is immaterial on what part of the paper the witnesses sign their names, provided they sign after the testator, and in his presence, and that the signatures of the witnesses are placed to the document for the purpose of attesting the signature; and I am satisfied that the attestation in this case was an attestation of the signature to the first part of the paper, and that only. The present case is a stronger one than the case of *Taylor, Deceased* (1), in which the law is clearly laid down. Certain differences have been pointed out between that case and the present. In the first place, in this case both the documents are dated, one at the top and one at the bottom. In *Taylor's Case* (1) neither of them had dates. Again, in *Taylor's Case* (1) the second document was expressly called a codicil. That circumstance, however, has no bearing on the present question, whatever it may have on the second part of the argument. Therefore, on the authority of the decision in that case, the propriety of which has never been questioned, I am of opinion that the attestation validated only the first part of the paper, and that,

(1) 2 Rob. 411.

Probate. 1894.

WOODROOFE v. CREED

irrespective of the effect of what was written on the third page of the document, the intermediate portion is invalid.

I now come to the second point which has been raised in the case. There is no doubt that a reference, in a subsequently executed testamentary paper, to a previously existing unattested document, or to unattested alterations, is sufficient to validate such document or alterations. The question is, whether there is a reference in this codicil to the second part of the document, which, I apprehend, was not attested at the date of the codicil. The words are: "By this codicil to my last will and testament I leave and bequeath to my nephew Francis Creed, of the Provincial Bank, Cork, the sum of £7 sterling." What document is referred to by those words, "my last will and testament"? I have decided that the will is the portion of the writing above the first signature, and that the other part of the document is not part of the "last will and testament," in point of law; and I find that though, in the case of *Taylor, Deceased* (1) the intermediate part was called a codicil, it was also called a will; and nothing turned on the use of the word "codicil" or "will." Here the words in the intermediate portion of the document, "my aforesaid last will and testament," point out what the testator contemplated as his last will and testament being the first part of the writing. The authorities were all considered by me in the case of "*In the Goods of Spotten* (2), which was referred to by Mr. Ronan. He admits that it correctly states the law, and that decision has never been quarrelled with. There is no reference in the codicil to the intermediate unattested paper.

The result is, I shall declare that the first part and the third part of the document, excluding the second part, constitute together the last will of the testator. I find, as a matter of fact, that the attestation of the will only amounted to an attestation of the upper signature, and there being no executor appointed, whoever is entitled to administration with the will annexed will get it, as a matter of course, in the office.

The difficulty in this case having been created by the testator, I think, quite independent of the consent, that it is proper that the

(1) 2 Rob. 411. (2) 5 L. R. Ir. 403.

parties should get their costs out of the assets. The defendant who has signed the consent will get his costs up to the date of the consent.

Solicitor for the plaintiff: *Wm. Lane.*
Solicitor for the defendant: *H. C. West.*

R. W. L.

DENNIS *v.* ADDY.

(1890. No. 12,073.)

M. R.
1894.
Jan. 31.

Statutory lien of solicitor—Charging order—Mortgage—Deposit of title-deed—Priorities—Pending suit—Legal Practitioners (Ireland) Act, 1876 (39 & 40 *Vict. c.* 44), *s.* 3.

In April, 1890, a farm of land, held by the defendant, under a lease, was put up for sale by public auction, and the plaintiff was declared the purchaser.

The plaintiff commenced an action for specific performance of the agreement for sale, and a decree was made, dated 30th January, 1891, directing the defendant to convey. The decree was never acted on, and the suit was not brought to a conclusion. The solicitors representing the plaintiff in the action for specific performance were not paid their costs. On the 29th July, 1892, the plaintiff deposited with S. the lease of the farm of land, as security for money which he owed to S. and to prevent S. from proceeding with an action against him. Subsequently a correspondence took place between plaintiff's solicitors and the solicitors of S. No mention was made in the correspondence by the plaintiff's solicitors of the costs due to them or of a claim to lien, but it conveyed the fact that they were the solicitors in proceedings through which the lands had been recovered, and that these proceedings had not been brought to a conclusion. On the 25th November, 1892, the plaintiff was adjudicated a bankrupt, and by a statement of affairs prepared, with the sanction of the plaintiff's solicitors, dated the 26th November, 1892, S. was returned as a secured creditor, and the solicitors of the plaintiff among the general unsecured creditors, in respect of their costs. A similar statement of affairs was filed and used in the Bankruptcy Court:—

Held, that the solicitors of the plaintiff were entitled to a charging order for their costs, when taxed, under 39 & 40 Vict. c. 44, s. 3, on the interest of the plaintiff in the lands, and that this right of lien in respect of costs incurred in a still pending suit ought not to be postponed to the equitable mortgage of S., inasmuch as there had not been any fraud, misrepresentation, or concealment on their part.

M. R. 1894. DENNIS *v.* ADDY.

MOTION.

The defendant held a farm of land at Tyrrellstown, in the county Dublin, under lease for years, dated the 12th December, 1872, at the yearly rent of £188 16*s.* 10*d.*, which had been judicially reduced to £140. The rent having fallen into arrear, the defendant's interest in the lands was put up for sale, and was sold to the plaintiff on the 18th April, 1890. Subsequently, on the 31st August, 1892, the rent of the farm was, by consent, reduced to £120, and the plaintiff was treated in that transaction as the tenant.

On the 4th January, 1890, plaintiff commenced an action against defendant for specific performance of the agreement for the sale of the farm of land, and, by decree, dated the 30th January, 1891, the defendant was ordered to convey to the plaintiff, but this decree was never acted on. The firm of Gerrard & Co. acted as solicitors for the plaintiff in these proceedings, and also in proceedings which had been previously taken by the plaintiff to obtain a writ of réstitution of the farm of land, a writ of execution having, previous to the sale, been executed on foot of a judgment for non-payment of rent by the landlord.

On the 29th July, 1892, the plaintiff deposited with Mr. Scott (to whom he was largely indebted, and who had caused him to be served with a writ) the lease of the farm at Tyrrellstown, as a security in respect of his indebtedness. In consequence of the deposit of the lease with him, and the payment of £100, Mr. Scott forbore from further pressing on the proceedings against the plaintiff. In his affidavit Mr. Scott stated that when he received the lease he had no notice of any mortgage, charge, lien, or incumbrance in any way affecting the farm of lands comprised in the lease. A correspondence subsequently took place between Gerrard & Co. and Scott's solicitors. In it there was no direct mention of the costs due to Messrs. Gerrard, or of a claim to lien; but the state of affairs as regards the proceedings in which the lands had been recovered, and in which Messrs. Gerrard had acted as solicitors, and the non-conclusion of the proceedings, were explained to Scott's solicitors.

On the 25th November, 1892, the plaintiff was adjudicated a bankrupt, and a statement of his affairs, dated the 26th November

of the same year, was prepared by accountants, with the sanction of Messrs. Gerrard. It returned Scott as a secured creditor for £965 9*s.* 1*d.*, and Messrs. Gerrard, among the list of general creditors, as creditors for £60, which included the costs of the proceedings in the action for specific performance.

The statement returned the lands as held under a judicial lease, as of the estimated value of £500, and as held as security by Scott. There was also a similar statement of affairs, bearing the name of Messrs. Gerrard, filed in the Bankruptcy Court.

On the 31st January, 1894, an application was made to the Master of the Rolls, on behalf of the firm of Gerrard & Co., that it might be declared that the applicants, as solicitors employed by the plaintiff in the prosecution of the action of *Dennis* v. *Addy*, were entitled to a charge upon the share and interest of the plaintiff and of John A. Maconchy, Alexander Knox M'Entire, and Edward M. Hodgson, as his assignees, and of Adam Scott, the purchaser of the said premises, of and in the lands of Tyrrellstown, in the county of Dublin.

Molony, in support of the application :—

When the equitable deposit was made to Scott on the 29th July, he may not have known of the existence of the Chancery suit; but he had no information as to how the lease had become vested in plaintiff. He was then put upon inquiry, and had notice of the proceedings. He was then told "there is a suit pending," and he must be presumed to have had notice of the costs incurred: *Haymes* v. *Cooper* (1); *In re Fiddey* (2). Under the circumstances we are entitled to a charging order for the costs incurred in proceedings which have not been terminated, and we are entitled to priority over the claim of Scott, under the transaction of the 29th July: *Faithfull* v. *Ewen* (3); *Shippey* v. *Gray* (4).

Ignatius O'Brien, contra :—

The exercise of this power in favour of a solicitor is purely discretionary, and, under the circumstances of this case, the Court

(1) 33 Beav. 431.
(2) L. R. 7 Ch. 773.
(3) 7 Ch. Div. 495.
(4) 49 L. J., Q. B. 524.

M. R. 1894. DENNIS v. ADDY.

ought not to exercise it: *Harrison* v. *Harrison* (1); *Roche* v. *Roche* (2). The solicitors have abandoned their right by their own acts in this case. The statements of affairs in reference to the bankruptcy proceedings, prepared by Messrs. Gerrard, show that they considered they were, and represented themselves to be, unsecured creditors. On the transaction of the 29th July Scott took as a purchaser without notice and is entitled to defeat the claim of the solicitors.

THE MASTER OF THE ROLLS:—

In this case the facts are as follows:—John Addy, the defendant in the action, held the farm of Tyrrellstown, under a lease dated the 12th December, 1872, from Lord Howth, at the yearly rent of £188 16*s*. He allowed the rent to fall into arrear, and his interest in the farm was put up for sale, and was sold to James Dennis on the 18th April, 1890, and, subject to the completion of the contract, Dennis became the equitable owner of the lessee's interest. About the same time proceedings for the purpose of fixing a fair rent were instituted. These original proceedings resulted in a reduction of the rent of the farm to £140, and that was subsequently reduced by consent, when an appeal was pending, on the 31st August, 1892, to £120, and Dennis was, in that transaction, treated as the tenant, it being important to note that no claim to the tenancy was made by Dennis till after the institution of the fair rent proceedings. The rent fell into arrear, and Dennis was advised to redeem. He brought an action on the 4th June, 1890, for the specific performance of the agreement for sale which Addy had made with him, and a decree, dated the 30th January, 1891, directed the defendant Addy to convey to him, or his nominee, in the usual form. This decree was never acted on, nor will it be, in the events which have happened. In these proceedings Messrs. Gerrard were the firm of solicitors representing the plaintiff. Mr. Thomas Gerrard died on the 22nd Nov., 1890, before the decree directing the execution of the conveyance, but after the suit had progressed for some time. One of his executors is dead. Mr. Daly has been carrying on the business

(1) 13 P. D. 180. (2) 29 L. R. Ir. 339, 345.

since Mr. Thomas Gerrard's death, and the greater part of the costs in reference to the proceedings have been incurred since the death of Mr. Gerrard. These costs have never been taxed, but have been furnished at over £50. The result is, that there is a pending suit which has not been wound up, but a decree requiring the execution of a conveyance has been pronounced in it. It is still effective, and capable of being used as against the plaintiff or defendant in it. It is in all respects an effective suit, but for the transactions which I will mention. Dennis was largely in debt, and he was served with a writ by Mr. Scott, a creditor for nearly £1000, and who apparently held other securities from Dennis besides that which he acquired on the day after the issue of the writ against Addy. On the 29th July, 1892, Dennis deposited with Scott such papers (I suppose the lease of the lands of Tyrrellstown) as were sufficient to constitute a valid equitable deposit, and to pledge whatever interest Dennis had in the lands, on the 29th July, 1892. There is nothing to show whether or not Scott was aware of the claim for costs by Messrs. Gerrard; but the equitable deposit could pledge to Scott only such interest as was left in Dennis, and therefore if Messrs. Gerrard had at that time a lien on the property, the equitable deposit could only place the interest in the farm in Scott subject to the lien, which, being earlier in point of time, would prevail, unless it had been lost or abandoned through some misconduct, or from the failure of the solicitors to secure the position that an equitable creditor should obtain. Messrs. Gerrard were depending on the proceedings in the suit for their costs, and in the ordinary course at any time the Court would have declared them entitled to a lien for their costs of the proceedings which had resulted in the acquisition of a title to the lands by Dennis. On the 29th July, 1892, what was their position? Nothing could be put in force by Scott against Dennis to the prejudice of Messrs. Gerrard without his coming to the Court, and in the ordinary course they were possessed of a potential lien. Scott went to his solicitors, and a correspondence commenced between Messrs. Scallan and Messrs. Gerrard. In the first letter of Messrs. Gerrard the whole matter is fully explained. True, there is no mention made of their costs or of a claim to lien; but it is perfectly frank in its terms, and in the result must have

M. R. 1894.

DENNIS v. ADDY.

conveyed that there were proceedings in which the lands had been recovered, that Messrs. Gerrard were the solicitors in those proceedings, and that they had not been brought to a conclusion. Messrs. Scallan knew that the plaintiff was an embarrassed man, and must have inferred from their knowledge of affairs that the solicitors had not been paid their costs. The same thing appears in all the letters. It was plain that the agreement had not been completed: and although it was not directly mentioned, it seems to me certain that Messrs. Scallan knew that the costs had not been paid, or at any rate must have believed it as something so extremely probable that any contrary supposition would have been wildly unlikely.

On the 25th November, 1892, Dennis was adjudicated a bankrupt, and a statement of his affairs, for the purpose of bankruptcy proceedings, dated the 26th November, was prepared by Messrs. Gerrard. The statement of affairs bears the name of a firm of accountants, and has not the name of any solicitor attached to it. But it was prepared and circulated in the bankruptcy proceedings, and no doubt, to some extent, Messrs. Gerrard were responsible for it, as it must be presumed to have been done with their sanction. It shows that Scott was a secured creditor for £965 9*s.* 1*d.* It returns Messrs. Gerrard as creditors, and inferentially it appears that they are unsecured. In that list Messrs. Gerrard are put down as creditors for £60, and there is no controversy that that sum of £60 includes the costs of the proceedings in *Dennis* v. *Addy*, so far as they were due at that time. It states that the lands of Tyrrellstown, under judicial lease, were of the estimated value of £500, and were held as security by Scott. That document, so far as it goes, is a representation, innocent even if inaccurate, that Messrs. Gerrard were amongst the unsecured creditors; but it was filed and used in November, 1892, and the assignees in bankruptcy could not, by any transaction subsequent to this, convey better rights than were in them at that date to convey. There is also another document, bearing the name of Messrs. Gerrard, being a statement of affairs filed in the Bankruptcy Court. It was on these two matters that Mr. O'Brien was obliged to rely, as showing that by virtue of the equitable deposit Scott was entitled to defeat the claim for lien. The equi-

table deposit was complete on the 29th July, and if there were any fraud or concealment, or the like, the prior equity could not prevail over it, as, in that case, Messrs. Gerrard would have been placing Dennis in a position to commit a fraud on Scott. There is nothing of the sort in the case. The relative positions have been in no way changed, and must be tested by their priority in time. Messrs. Gerrard's is an honest claim in respect of costs for proceedings which resulted in producing whatever title there is in Dennis, and but for them he would have no interest in these lands; and there is an equity affecting them in the hands of the client. Messrs. Gerrard are entitled to lien on the lands, but the costs must be taxed.

M. R. 1894.

DENNIS v ADDY.

Solicitors for Messrs. Gerrard & Co.: *The Applicants in person.*
Solicitors for Mr. Scott: *J. L. Scallan & Co.*

R. W. L.

IN RE MICHAEL DAVITT (1).

Appeal. 1893. Nov. 23. — 1894. Jan. 30.

Bankruptcy—Certificate of conformity—Failure to pay 10s. *in the pound—Circumstances for which the bankrupt could not be justly held responsible—Section* 56 *of the Bankruptcy (Ireland) Amendment Act,* 1872 (35 & 36 *Vict. c.* 58)*—Costs of an election petition.*

D. was invited to stand as a candidate at a Parliamentary election for North M., and his expenses were provided. He accepted the invitation, issued his address, and made some speeches. On the 28th June, 1892, he was informed that the Roman Catholic Bishop of M. was about to issue a pastoral, and he requested that it should not be issued till after the election. The pastoral was issued on the 29th June. On the 7th July, D. was nominated along with M.; the election took place on the 15th July, and D. was returned by a majority. A petition was presented to declare the election void on the grounds of undue influence and intimidation, but before it was heard, a petition against the return of the candidate for South M., on similar grounds, was decided on the 30th November, 1892, and the election was declared void. On the 15th December, 1892, when the petition against D.'s return came to be heard, an application was made by D.'s counsel to stay further proceedings, D. offering to give up the seat, but the Judges declined to accede to the application. The

(1) Before WALKER, C., PORTER, M.R., and FITZ GIBBON and BARRY, L.JJ.

Appeal. 1893. *In re* DAVITT.

case was tried, the trial lasting for eight days, and D. was unseated, and ordered to pay the costs of M. The costs amounted to over £1800, and being unable to pay, he was adjudicated a bankrupt. He had substantially no other creditors, the total liabilities being £2061, and the assets £227. On an application by D. for his certificate of conformity:—

Held (reversing the decision of Boyd, J.), that the inability of D. to pay 10*s.* in the £1, arose from circumstances for which he could not be justly held responsible within the meaning of s. 56, of the Bankruptcy Act, of 1872, and that he was entitled to his certificate of conformity.

APPEAL by the bankrupt from an order of Boyd, J., refusing a certificate of conformity.

The adjudication took place on the 6th May, 1893, on the petition of Pierce Mahony, and the debt of the petitioning creditor was a sum of £1888 16*s.* 7*d.*, the amount of the taxed costs of an election petition.

The bankrupt, in response to an invitation, attended a convention at Navan, on the 1st June, 1892, for the purpose of selecting a candidate for North Meath. On being asked if he would consent to be nominated, he stated that he had not any money, and that he could not defray the sheriff's expenses, or any other whatsoever, in connexion with the election. The Rev. P. Kelly then stated that he would not be expected to pay any of the expenses, as the committee had undertaken to collect the necessary funds. Relying on this promise, the bankrupt consented to be nominated, and, on the day of the nomination, received £200 to pay the sheriff's fees, which he handed over to the sub-sheriff. The bankrupt subsequently received a sum of £70 for his personal expenses in connexion with the said election. Mr. Pierce Mahony was also a candidate for North Meath, and contested the election as a Parnellite candidate. The polling took place on the 15th July, 1892, and the bankrupt had a majority of 403 votes, and was declared duly elected.

A petition was presented by Mr. Mahony to unseat the bankrupt for bribery and undue influence, and the case was tried before Andrews and Johnson, JJ. It commenced on the 12th December, and lasted for eight days. The evidence mainly relied on in support of the undue influence was a pastoral letter written by Dr. Nulty, the Roman Catholic Bishop of Meath, which was read

in all the churches and chapels in the diocese a short time before the election.

At the same election there was a contest in South Meath between Mr. Patrick Fulham and Mr. James Dalton, who was the Parnellite candidate, and Mr. Fulham was returned. A petition was presented against his return by Dalton on the same grounds on which the bankrupt's election was impeached, and also on the grounds of physical violence. That petition was heard by O'Brien and Andrews, JJ., before the petition against the bankrupt's election, and judgment was given on the 30th November, 1892, when the election was declared void on the ground of intimidation and undue influence practised by priests, and the pastoral of Dr. Nulty. When the trial of the petition against the bankrupt came on to be heard, the counsel for the bankrupt stated that they could not resist the petition on the grounds above stated, and with the concurrence of counsel for the petitioner, offered to accede to the same order as was made in the South Meath case. The judges declined to adopt this course, on the ground that their decision should be based upon the evidence which might be adduced in the case. The trial was then proceeded with, and lasted for eight days. Judgment was given on the 23rd December, 1892, declaring the election void on the ground of clerical intimidation and undue influence. The other charges made by the petition were declared to be disproved, and the bankrupt was ordered to pay the costs of the petitioner, except so much as related to the charges in the petition which he had failed to sustain. The bankrupt himself did not directly or indirectly sanction any illegal practice during the election, and he had not only not sanctioned the pastoral, but had requested that it should not be published.

The only other creditors were the National Bank for £161 14*s.* 7*d.*, and Healy & Son, tailors, for £11 4*s.* 6*d.*, the former of which was secured by the bankrupt's wife. It was stated in an affidavit by the solicitor for the petitioning creditor that the bankrupt had refused an offer of a subscription to pay his costs, and that, on the 31st December, 1892 (one week after the judgment awarding the costs against him) he had sold out shares to the extent of £275, which he then paid away to his other creditors.

The final examination was passed on the 27th June, 1893, the

Appeal. 1893. *In re* DAVITT.

total liabilities being £2061 15*s.* 8*d.*, and the estimated assets £227 10*s.*

On the 24th October, 1893, Boyd, J., refused the application of the bankrupt for a certificate, and from that order the bankrupt appealed (1).

(1) The following was the judgment of BOYD, J.:—

I have formed the opinion that I cannot, in the words of the Act of Parliament, certify that Mr. Davitt was not responsible for the bankruptcy, and for the non-payment of 10*s.* in the £1. After a careful consideration of all the arguments addressed to me, I am of opinion, that Mr. Davitt was directly responsible for the bankruptcy in this case, and I may even go so far as to say for the non-payment of 10*s.* in the £1. There was no disqualification upon Mr. Davitt for being a poor man, or any other poor man seeking a seat in Parliament if he thought fit, and sitting in Parliament if he were elected at a pure election. But if a man who was unable to pay the necessary expenses of an election chose to indulge in the luxury of an election he must look forward to what may be the reasonable outcome of that election. Now, ordinarily speaking, in the majority of instances, elections were, so far as the public were aware, pure, and the members elected by the constituencies were allowed to hold their seats; but in several instances elections had been challenged and petitions had been filed, and filed generally in cases where there had been some justification by the acts of the parties at the election for filing such a petition. If a poor man stood for Parliament he must take very good care that he was not involved in a series of expenses which might utterly ruin him, and therefore it behoved him to be more careful than a rich man would. Now, what has been proved as regards Mr. Davitt? I passed his final examination and all the proceedings in court, because he gave his evidence straightforwardly, he thoroughly disclosed all the assets he had, but when he came for a certificate it was quite a different question altogether. Now, under what circumstances did Mr. Davitt contest Meath? He went down there and issued his address, the selected of the clergy and other parties in the district, and one of his chief supporters thought fit, on the very eve of the nomination, to prepare a document which has been condemned by three judges who had heard the election petitions in both North and South Meath, and I am bound to say that, having looked at that document, it was not open, in my opinion, to the judges to come to any other conclusion than the one they arrived at. A more shocking piece of intimidation had not been tried for a long time by any gentleman, more especially a gentleman occupying the position of Dr. Nulty. On the publication of that document it was perfectly plain that the election could not stand. What did Mr. Davitt think of it? It was brought to the notice of Mr. Davitt, and Mr. Davitt highly condemned it, and said he wished the document had never been published, and he wished that to be conveyed to Dr. Nulty. But the

Carton, Q.C., for the bankrupt:—

Until 1872 the granting of a certificate was a matter for the Judge—but in the first instance there was no discretion given to the Court at all. Substantially, the matter was left to the creditors. There is only one reported case in Ireland: *Re Spotten* (1),

document was published. Mr. Davitt, knowing the character of it, did not withdraw then as he might, but went on in the face of that document, of which he disapproved, and which has been condemned by the three judges who tried the petitions. Now, that machine having been set in motion, and the party having taken advantage of its motion, he must adopt the consequences that would reasonably flow from it. What were the consequences that would reasonably flow from it? A petition and the unseating of the member. That must necessarily have been within his contemplation. Having that document used altogether in his favour he went on not only to his nomination, he went on through the contest; he not only went on through the contest, but the election petition that subsequently resulted from it. And the gentlemen who were associated with him used Dr. Nulty's pastoral to the utmost extent, and Mr. Davitt made use of it by adopting it and fighting the battle with it. He asks me to say he was not responsible for the outcome of the pastoral. What was the natural outcome of it? A petition, and the natural outcome of the petition was the unseating of the member. Now what were the expenses incurred? The expenses incurred by Mr. Davitt personally, so far as I can gather, on his own side of the petition, have been all paid. But as far as regarded the indemnification of his opponent, who had the misfortune to unseat him by the petition, they have not been paid, and the consequence was that this gentleman, feeling aggrieved at not being paid these expenses to which he was declared entitled by the judges who tried the petition, took proceedings in bankruptcy against him. He had no other creditors; but this man, not having been paid a farthing of his expenses, to which he was legitimately entitled, thought fit to ask Mr. Davitt to pay them, or if he did not pay them that he should take the ordinary consequences of not paying a debt due, and that consequence was that bankruptcy supervened. In my opinion, that bankruptcy was an act for which Mr. Davitt was responsible. It was, perhaps, unnecessary to say whether he was responsible for not paying 10*s.* in the pound. I do not think any gentleman, if he was unable, at all events, to pay 10*s.* in the £1, had a right, under the circumstances I have mentioned, to aspire to be member for the constituency and to put his opponent to an expense which he could not meet if he was defeated on a petition. Supposing a trader came into this Court, and that trader—not meaning any reflection on the trade or locality—I would say a small huxter in Britain-street, thought fit to go in for a speculation in a cargo of grain; if that turned out

(1) 12 Ir. L. T. R. 15.

Appeal. 1893.

In re Davitt.

and there the certificate was refused. The question is, whether, under the circumstances under which this petition was presented, the bankrupt is "justly" responsible. "Justly" means fairly and properly, having regard to all the circumstances. It cannot mean legal liability. The bankrupt is not responsible for the pastoral; he did all he could to prevent it. If, in the result, he was unseated, and rendered liable for the costs of the petition through no fault of his own, he is not justly responsible. He has practically no other debts. On the question of discretion, although the Court of Appeal will not readily interfere with the discretion of the Court of first instance in a matter of procedure, it is its duty to exercise its own discretion. This was done in an application to set aside a pleading in *Davy* v. *Garrett* (1). To the same effect are *Jarmain* v. *Chatterton* (2) and *Gardner* v. *Jay* (3). This is a question which affects a man's *status*.

O'Shaughnessy, *Q.C.*, and *Henry*, for the assignees:—

The *onus* is upon the bankrupt, as the words of the section are that the certificate shall not be granted unless the conditions are fulfilled. The Court below having exercised its discretion, that discretion should not be interfered with: *Wallingford* v. *Mutual Society* (4). The same principle was held with regard to an application for an order of discharge of a bankrupt under sect. 28 of the Bankruptcy Act, 1883, in *Ex parte Castle Mail Packet Co.; Re Payne* (5), where the Court held that they would not readily interfere with the discretion of the registrar. In *Ex parte King* (6)

successful, it was all well, if it did not, could I say that that man when he applied for a certificate was not responsible for the non-payment of 10*s*. in the £1? Mr. Davitt has been condemned to pay £1800 costs, and the answer he gave to the gentleman who asked him to pay that was, "Make me a bankrupt if you like. If you make me a bankrupt, I have not a farthing to pay it. I, as a person without means, aspired to the luxury of a seat in Parliament. I have been defeated, and I have been ordered to pay costs, but I will ask the Judge for a certificate." On the whole case, I cannot conscientiously certify that Mr. Davitt was not responsible for the bankruptcy or for not being able to pay 10*s*. in the £1, and therefore I must refuse the application.

(1) 7 Ch. Div. 473.
(2) 20 Ch. Div. 493.
(3) 29 Ch. Div. 50.
(4) 5 App. Cas. 685.
(5) 18 Q. B. Div. 154.
(6) 15 Ves. 126.

Appeal. 1893. *In re* DAVITT.

Lord Eldon held that the judicial discretion of the Commissioners of Bankruptcy as to the certificate was not subject to control.

Section 48 of the English Bankruptcy Act of 1869 regulates the order of discharge, and there the words are used "justly held responsible"; but the matter was left to the creditors. By the Act of 1883, sect. 32, the bankrupt might obtain his discharge with a certificate that his bankruptcy was caused by "misfortune without misconduct." The only case decided under that section is *Re Lord Colin Campbell* (1), where it was held that the failure by the debtor to pay the costs of a suit for divorce instituted by him against his wife was not "misfortune without misconduct." But the certificate there is granted for the purpose of getting rid of disqualifications mentioned earlier in the section, and these disqualifications extend to all parts of the United Kingdom.

WALKER, C.:—

1894. Jan. 30.

This is an appeal from an order of Judge Boyd, dated the 24th October, 1893, by which he refused to grant to the bankrupt a certificate of conformity under section 56 of the Act of 1872.

By that section, when a bankrupt has passed his final examination he may apply to the Court for a certificate of conformity, "but such certificate shall not be granted unless it is proved to the Court that one of the following conditions has been fulfilled." [His Lordship read sub-sections 1 and 2.] The Court is authorized to suspend for such time as it deems just, or withhold altogether the certificate—(1) if a prosecution has been commenced against the bankrupt under the Fraudulent Debtors Act, and (2), if the Court is of opinion that the bankrupt has not made a full disclosure and discovery of his estate and effects, or has made default in giving up to his creditors the property which he is required under the Acts to surrender.

Mr. Davitt was adjudicated a bankrupt on the 6th May, 1893. The act of bankruptcy was non-appearance to a debtor's summons issued at the suit of Mr. Mahony, for £1886 6*s.* 7*d.*, taxed costs of an election petition arising out of an election for a division of Meath, in which Mr. Davitt and Mr. Mahony were rival candidates.

(1) 20 Q. B. Div. 816.

Appeal. 1894.

In re DAVITT.

Walker, C.

The bankrupt passed his final examination on the 27th June, and the official assignee certified that he had made a full disclosure of his estate. It was patent that the bankrupt could not pay 10*s.* in the pound on the petitioning creditor's debt, which was substantially his only one, and Judge Boyd decided that he was not satisfied that the bankrupt's failure to pay 10*s.* had arisen from circumstances for which Mr. Davitt should not justly be held responsible.

Before we apply section 56 of the Act of 1872 to the facts, it would be convenient that I should state the legislation on this subject, and I may observe that we are not dealing with the *status* of Mr. Davitt as a candidate for Parliament, or at all with any parliamentary *status*. We are only considering whether, having been made a bankrupt, he is entitled to the certificate of conformity, that is, the certificate of having conformed to the law of bankruptcy, which discharges bankrupts from debts and frees future-acquired property. The Act of 1872 amends the Act of 1857. By that Act, sect. 143—[His Lordship read the section] The form of certificate of conformity provided by section 144 is practically the same as that prescribed by the Act of 1872.

The English Bankruptcy Act of 1869 (32 & 33 Vict. c. 71) contains, in section 48, a provision regulating the terms upon which an order of discharge shall be given to a bankrupt. It enacts in effect that such discharge shall not be granted unless 10*s.* has been paid, or a special resolution of his creditors has been passed to the effect that his bankruptcy, or the failure to pay 10*s.*, has, in their opinion, arisen from circumstances for which the bankrupt cannot justly be held responsible, and that they desire that an order of discharge should be granted to him. Section 121 attaches certain disqualifications to a member of Parliament, being such, who becomes bankrupt.

It is on this Act that ours of 1872 is substantially modelled; and the words "justly be held responsible" occur in both sections. Sects. 56–60 are the provisions relating to a certificate of conformity, and its effect. Section 60 is the one which regulates the *status* of an uncertificated bankrupt, leaving him subject to heavy responsibilities. Sections 40 and 44 provide for the case of a member of Parliament who, being such, becomes bankrupt, and, in effect, his seat is vacated unless within a year the order is annulled or the

debts paid, he being in the meantime incapable of sitting or voting. I shall recur to the Act of 1872 when I state the existing English law.

The Act of 1883 (46 & 47 Vict. c. 52) in England contained distinct provisions for each of two matters—in the Acts differently treated—viz. 1, discharge of the bankrupt—the equivalent to our certificate of conformity; and, 2, disqualifications of the bankrupt. The legislation regarding the first is contained in section 28, which vests a large discretion. [His Lordship read sub-sect. 2.] And then it contains a provision, making it obligatory on proof of facts enumerated (eight in number), to refuse the order, or suspend its operation, or grant it subject to conditions. One of these facts is that the bankrupt has put any of his creditors to unnecessary expense by a frivolous or vexatious defence to any action properly brought against him.

The legislation regarding the order of discharge is now contained in section 8 of the Act of 1890 (53 & 54 Vict. c. 71), which uses almost the same language as is used in our Act of 1872. But the disqualifications of the bankrupt are contained in sections 32 to 36 of the Act of 1883: they are—sitting or voting in the House of Lords, or any committee thereof, sitting or voting in the House of Commons, being appointed or acting as a justice of the peace, being elected to or holding the office of mayor, alderman, or councillor, being elected to or holding the office of guardian of the poor, overseer of the poor, or member of a school board, highway board, burial board, or select vestry.

It was on those latter clauses that the case of *Lord Colin Campbell* (1) turned, which is a very important case, but I think in no sense an authority for the respondent. Lord Colin Campbell was a respondent in a divorce suit brought by his wife, and he, on the 7th November, 1884, presented a petition against his wife on the ground of adultery, naming several co-respondents. The proceedings were taken under the advice of counsel. Both petitions were dismissed, and Lord Colin Campbell was ordered to pay all costs of his wife and the co-respondents, which, with his own, amounted to £4943 11*s.* 6*d.* One co-respondent made him a

(1) 20 Q. B. Div. 816.

Appeal. 1894.

In re DAVITT.

Walker, C.

bankrupt for his costs, amounting to £971 13*s.* 2*d.* The assets were only £110 7*s.*

An unconditional discharge was granted to him, under sect. 28—a fact of importance in its bearing on the present case, and he afterwards, in order that his disqualifications might be removed, applied, under sect. 32, for a certificate that his bankruptcy was "caused by misfortune, without any misconduct on his part." The registrar refused the application, and the bankrupt appealed. It was contended that as there was no misconduct under sect. 28, therefore there must have been "misfortune" only; but the Court held that "misfortune" must also receive its interpretation. Lord Justice Fry defines it, at p. 822, as "equivalent to some adverse event not immediately dependent on the actions or will of him who suffers from it, and of so improbable a character that no prudent man would take it into his calculations in reference to the interests either of himself or of others.

We have nothing to do here with such disqualifying enactments, nor have we to interpret the words "misfortune without any misconduct." We have to consider the right to get an order for discharge, which in that case the bankrupt in fact obtained, though he deliberately embarked on litigation proved to be groundless, with the result that he incurred costs sufficient to make him bankrupt, and which in fact produced bankruptcy.

Returning to the Act of 1872, it is obvious that the words "justly be held responsible" cannot mean "legally responsible." They must mean "irrespective of legal liability and of the condition in which that legal liability has left the bankrupt, namely, bankruptcy." They involve, I think, a proof to the Court exercising a judicial discretion that the bankruptcy or failure to pay 10*s.* has arisen from circumstances for which, taking all the circumstances into account, including of course the nature of the debt, and the manner in which it was incurred, and the circumstances out of which it sprang, the bankrupt cannot fairly and reasonably be held to suffer, though he has paid the legal penalty in bankruptcy. The words are of the widest kind. It is obvious that the accrued liability for the costs under the judgment against Mr. Davitt as respondent in the election petition—a judgment delivered on the 23rd December, 1892—induced the

bankruptcy; and, having regard to the amount of the costs, there followed in this case an absolute inability to pay 10*s*. The same result would have probably occurred if the costs had been half the amount. Is the accrued liability for the costs one for which, putting legal liability aside, he ought to be treated, as a matter of reasonableness, responsible for? To test that, I think we must go back and take up the case as on the 1st June, 1892. Mr. Davitt was then solvent, and his income was equal to his wants. He was an active politician, and one whom Irish constituencies were willing to accept as a candidate on the terms of contributing to his election expenses. Accordingly, he was invited to stand for North Meath, and his expenses were guaranteed—in fact they were provided.

It is necessary to give a short outline of the circumstances attending Mr. Davitt's candidature. On the 28th June he heard from a priest of the intention of the Bishop to issue a pastoral. He met the Bishop's administrator by desire, and told him he had learned the Bishop intended issuing a pastoral in reference to the election, and asked him to convey to the Bishop an earnest request not to issue the pastoral until after the election was over, as he believed it could do him no good, but might do him harm. The pastoral bears date the 29th June. It was published in the Drogheda paper on the 2nd July, and read in the chapels on the 3rd July. Mr. Davitt was nominated on the 7th July. He made speeches at various meetings in the interval. Priests accompanied him and canvassed for him. He accepted their aid, influence, and action on his behalf, and the Bishop was one of the nominators on one nomination paper. It appears there were five nomination papers, with a priest and a layman on each.

Take the dates of the 28th June and the 7th July. He had been a month before the county as the adopted candidate before the issue of the pastoral. He had accepted the aid of the priests and Bishop, in that candidature. It is said his standing makes him responsible. There were two courses only possible—not to allow himself to be put in nomination, or go on. But is he justly to be responsible, not only for being a candidate, but for (1) a petition, (2) the decision thereon, (3) the award of costs. Once nominated, he could not recede, nor could he prevent

Appeal. 1894. *In re* DAVITT. Walker, C.

people voting even if he so desired. As a fact, he still sought the votes and retained the clerical aid. Is Mr. Davitt, a layman, who probably never read the Act of 1883, and was not, so far as I can see, aided by any legal agent, to have such prophetic instinct, that he must be deemed acting so as fairly and reasonably to incur this tremendous responsibility because he did not, to avoid it, take the step of retiring from the contest? Taking, then, the standpoint of the 28th June to the 7th July for this part of the case, we must, I think, in applying the rough test of fair and reasonable responsibility, apart from law, take things as they are—elections, with their usual clerical accompaniments, as they are; candidates, who have been for a month canvassing, as they are; politicians as they are—and thus applying to Mr. Davitt, circumstanced as he was, the ordinary tests of human conduct, and therefore the test of reasonableness, I cannot see that he is "justly" responsible, so far, for the remote and contingent consequences which followed. Then, he was nominated on the 7th and returned on the 15th July. A petition was presented against his return within the statutory period, and its scope is of importance.

The petition for North Meath charged Mr. Davitt of being, by himself and his agents, guilty of undue influence and intimidation; also that the election and return was procured, through the Roman Catholic priests and Bishop, by spiritual influence and intimidation of the priests; that it was void by common law; that he was, by himself and his agents, guilty of the corrupt practice of bribery, and of the corrupt practice of treating; also, that he was, by his agents, guilty of illegal practices of hiring vehicles and paying railway fares. Particulars were ordered on the 31st October, 1892. They were delivered on the 22nd November, giving the names of twelve persons bribed, adding "other voters unknown." In four cases the names of persons who were bribed were "unknown." The Bishop and thirty-six priests were charged with undue influence and intimidation.

Having regard to the frame of the petition, it would have been impossible for the bankrupt to have submitted to the charges in it. The judgment in the South Meath petition was not delivered till

the 30th Nov., 1892, and at that date the six days before the day appointed for the hearing of the North Meath petition had long passed, so that on the dates it would have been impossible to admit the petition under the rules. When the case was called on, on the 15th December, an application was made by Mr. Davitt's counsel to stay all further proceedings, Mr. Davitt offering to give up the seat. The Judges declined to accede. Counsel on both sides seem to have been actuated by the best motives. The case proceeded. Eighty-six witnesses were examined for the petitioner, and the trial lasted eight days. It is right to say that if it had only lasted two, the same result of heavy costs, and probable inability to pay them, would have followed.

I do not think the element of frivolous or vexatious defence to litigation enters into the case at all. We, of course, treat as incontestible on this motion the judgment of the election Judges, and the grounds on which they based that judgment, namely, the conduct of Mr. Davitt's agents, and also the exercise of the Judges' discretion in awarding costs; but Judge Boyd, in effect, treats Mr. Davitt as responsible in advance for all those consequences, and gives his reasons. [His Lordship read portion of the judgment of Boyd, J., *ante*, pp. 520, 521.]

The doctrine that a man should not be a candidate for parliament unless he has means to meet the costs of the election petition would have far-reaching consequences, and seems to me *prima facie* far outside the region of fair and reasonable responsibility. It is true that in this case the *onus* is on Mr. Davitt. It is also true that it is the discretion vested in the Judge, which is being challenged; but the discretion is a judicial one, and inasmuch as it involves *status*, property, and liability, I think the exercise of it is clearly open to review.

Upon the whole case, I think Mr. Davitt was entitled to have the ordinary certificate of conformity granted to him, and that the order of Judge Boyd should be discharged, and the appeal allowed.

PORTER, M.R.:—

I have arrived at the same conclusion. The first question that presented itself to me as one of difficulty was, that this is an

Appeal. 1894. *In re* DAVITT. Porter, M.R.

appeal from what was undoubtedly the exercise of a discretion vested in the learned Judge. That, however, was a judicial discretion, and must be dealt with in accordance with the ordinary rules affecting judicial discretion. There is not in the present case, so far as I know, any matter of fact in dispute material to the question before us; and as the exercise of judicial discretion in this case affects the *status* of the bankrupt, it is properly the subject to appeal.

The next question is whether the case falls within the rule applied to it by the Judge of the Court of Bankruptcy. That resolves itself into this—What is the meaning to be attached to the word "justly" in the section to which the Lord Chancellor has referred, which enacts that the certificate shall not be granted unless a dividend of not less than 10*s.* in the pound has been paid out of the property, or "that the bankruptcy, or the failure to pay 10*s.* in the pound has, in the opinion of the Court, arisen from circumstances for which the bankrupt cannot be justly held responsible"? The attention of the learned Judge below does not seem to have been directed to this question. The word "justly" must obviously import something more than legal liability. There are many conditions under which legal liability would attach upon a bankrupt, but in respect of which it would be impossible to hold, under this section, that he could be "justly" held responsible. For example, if a man sent his servant out with his carriage, and an accident happened owing to the negligence of the driver, the master would be responsible, and justly responsible; yet no one could say that, within this enactment, and as regarding his right to a certificate, he could be "justly" held responsible, so as to deprive him of a certificate if his estate was unable to pay 10*s.* in the pound. I do not think it would occur to anyone to say that that was a debt for which, within the meaning of this clause, he was justly responsible. Or, take another case—one more nearly affecting property—a bailee of goods is, without carelessness on his part, robbed by his servant, and, for the loss of the goods, he is legally, and in some sense most justly, responsible; yet no one would say that, in the event of his bankruptcy, he was, for that reason, and by reason of the inability of his estate to pay 10*s.* in the pound, "justly"

responsible for the stolen money, in respect to his right to a certificate. There must, in the definition of "justly" in this context, be something quite distinguishable and apart from legal or equitable liability. Some element of moral, as distinguished from legal, liability must undoubtedly enter into the definition.

The point for us now to consider is, whether the responsibility for this bill of costs, for which Mr. Davitt the bankrupt was, of course, legally responsible, and for which, as between the parties to the proceedings, we must hold that in the ordinary sense he was justly responsible, was a liability for which he was to be held "justly" responsible in reference to the application for a certificate? A consideration of the facts of the case appears to me to indicate that he was placed in the position in which he found himself by circumstances for which he was not, in the first instance, accountable. By the appearance of the pastoral, which, no doubt, was brought to the bankrupt's notice as early as possible, since he was in Navan at the time, he was placed in a position of extreme difficulty. He was a lawful candidate, lawfully before the constituency. What was he to do? He had pledged and committed himself in such a way that it was practically impossible for a man in his position then to withdraw. He could no doubt have escaped from the position he was in by abandoning his candidature altogether, or by publicly repudiating all connexion with the Bishop whose pastoral had been brought to his notice. But before he could make up his mind to do either one or other of these things, if he was considering at all a certificate of conformity under the Bankruptcy Act, he would have had to make up his mind on a number of matters, every one of which would be essential to consider and weigh before he decided on his conduct. First, he would have to decide, as a matter of fact, that he would be held responsible for the act of the Bishop; secondly, he would have to decide that the act of the Bishop was of such a character as would involve the avoiding of the election; and, thirdly, he would have to decide that that would be conduct on his part which would not only lead to a voidance of the election on petition, but would involve him in liability for the costs of that petition. It is too much to expect that he should have had all these matters present to his mind, and I am almost certain that none of them

Appeal. 1894. *In re* DAVITT. Porter, M.R.

was present to his mind at all. For these reasons, I am of opinion that in any view of this section, within the sense which must be attached to it if it is to have any meaning at all, he could not be held to be "justly" responsible.

The chief difficulty which I at first felt in the case arose from the case of *In re Lord Colin Campbell* (1). But I think that the Lord Chancellor has satisfactorily distinguished that case. It turned on an Act of Parliament of a different nature, in which the words were, not "justly," but by "misfortune without misconduct." "Misfortune" is the leading word in that section. Lord Esher said :—"What, then, was the cause of the bankruptcy in the present case? In truth, it was the adverse verdict of the jury. We are bound to assume that the verdict given by the jury was right. What, then, was the conducing cause of that verdict? It was the fact of the bringing and carrying on of the suit—a matter which was entirely within the control of the debtor. The costs incurred in that suit were thus the direct result of matters over which the debtor had control, and therefore, without going into the question of the effect of the evidence in the divorce suit brought forward by the co-respondents, and without saying that it was rash to bring the suit, or that the doing so involved any misconduct, I think the appellant fails, because he has not shown that his bankruptcy was caused by 'misfortune.'"

Lord Colin Campbell's Case (1) did not decide that, in a case in which the bankrupt does not initiate litigation, but merely defends his seat as Member of Parliament, the circumstances which led to the petition may not be his misfortune; and if it were necessary to decide it, I consider that the word "misfortune" might well be applied, in reference to the bankrupt Davitt, to the issuing of this pastoral, which was done without his consent, and, when known to him, was, it appears contrary to his feelings and opposed to his wishes.

There is another matter in the case which I think might possibly have been taken into consideration. At the time the petition came on to be heard, the costs and expenses were, no doubt, very important considerations, and Mr. Davitt and his advisers

(1) 20 Q. B. Div. 816.

offered to give up the seat without proofs or evidence, if the learned Judges by whom the election petition was tried saw their way to permit this to be done. The Judges declined to adopt this course. I do not for one moment suggest that they were not absolutely right in declining to act on this proposal. But it might have been that the same Judges who had tried the election petition for South Meath would have tried the petition for North Meath, though, as it happened, only one of them took part in the determination of both cases. If they had, they would then have been able, on consent, to import their judicial knowledge of the facts of the case previously tried in such a way as would have avoided at least a very large portion of the expenses for which the bankrupt ultimately became answerable, and which have led to his bankruptcy.

On the whole, I am of opinion that this judgment for costs is one for which the bankrupt is not, within the meaning of the section of the Bankruptcy Act, "justly" responsible, and as there is no other question to be considered, I am of opinion that he is entitled to his certificate of conformity—a different matter from the certificate to enable him to sit in Parliament.

FITZ GIBBON, L.J.:—

Two minor arguments were addressed to us, as to which I wish to say a few words. The first contention was that the discretion of the Court of Bankruptcy, as a court of first instance, was such that the Court of Appeal ought not to interfere with it by way of appeal. The answer to that, in my opinion, is that the discretionary words, "in the opinion of the Court," apply equally to the Court of Appeal and to the court of first instance, having regard to their context, and to the subject-matter of the legislation. The legislation has placed the discretion, not, as is sometimes done, in the court of first instance, but in the tribunal that is to administer the law—that is, in the court of first instance, subject to review by the Court of Appeal. The matter is eminently one for judicial discretion, and the measure of that discretion turns largely on the construction of the statute.

The other preliminary matter is the bearing of *In re Lord Colin Campbell* (1) upon the present case. That case not only seems to

(1) 20 Q. B. Div. 816.

Appeal. 1894.

In re DAVITT.

Fitz Gibbon, L.J.

me to be no binding authority against the appellant here, but it deals with a different subject-matter, and with an enactment intended for a different purpose. Our section deals with a certificate of conformity in bankruptcy; the English judges had to deal with a special disqualification imposed upon a bankrupt, even after obtaining his discharge. The words being different, the purpose different, and the certificate different, it appears to me that the case could only be of assistance to us by way of analogy, and viewed in that way, it becomes an authority in the appellant's favour rather than against him, because the certificate most analogous to the one in question here was the certificate which Lord Colin Campbell had actually obtained.

I therefore come to the broad question—Whether the failure to pay 10*s.* in the pound has arisen from circumstances for which the bankrupt cannot *justly* be held responsible? We are unfortunately too familiar with the task of interpreting language in Acts of Parliament in a popular sense, and of dealing with statutes prepared on the plausible principle of putting the same language into a statute which an ordinary man would use in every day life. But here we have to determine whether a bankruptcy, the just and lawful and statutory consequence of a legal proceeding, and the failure to pay 10*s.* in the pound, have arisen from circumstances for which the party to that legal proceeding could not "*justly*" be held responsible. The "justice" cannot depend on the amount of the dividend alone, and I suppose we are to assume that in adjudging the appellant bankrupt, and in holding him responsible for the costs of the election petition, the Bankruptcy Court and the Election Judges have acted "justly." If so, we have not merely to interpret popular language, but we must give it a meaning different from and contradictory of its legal meaning, inasmuch as the bankruptcy and the debt have both been judicially declared to be "just," and the inability to pay 10*s.* in the pound is their inevitable consequence. Mr. Carton said that "justly" in this section of the Act meant "fairly and properly, having regard to all the circumstances." But that merely paraphrases one word by nine, and carries us no farther. I think it must mean that the man has failed to pay his debts rather from misfortune than from fault—under circumstances

which would make an ordinary man of the world think none the worse of him. What are the circumstances here? The possession of property is no longer a qualification for Parliament. A man who has none of this world's goods has as "just" a right to become a parliamentary candidate as anyone else, notwithstanding that the expenses of his election must be provided by others. No doubt a man who consents to become a candidate at the cost of others cannot be independent, and may be "justly" liable, in the legal sense, for his paymasters' negligence or misconduct. But if those in whose hands he so places himself are people who ought to know the law, and who may fairly be expected not to commit themselves or him, it is hard to say that he can be held morally wrong to trust them. If an agent entrusted with the management of a candidate's finances robbed or betrayed him, it would be hard to say that the employer was to be "justly held responsible" for the loss. Is it not going even a long way further to hold the appellant answerable, not only for the misconduct of the Bishop and the priests, whose candidate he became, but for the remote and distant consequences of bankruptcy, and of inability to pay 10*s.* in the pound, for the costs of a petition to set aside the election at which they misconducted themselves? I asked counsel what was Mr. Davitt to do when he found things conducted as they were by his ecclesiastical supporters, and I got no answer. The pastoral was published against his remonstrance, just before the election took place. On hearing it read, as I assume he did, was he to retire? As men of the world, are we not to think how absurd such a step would have seemed? And even if he had taken it, someone else must have come forward in his place, or the party in the constituency who disapproved of the other candidate must have been left unrepresented. When the election petition was presented, was he bound to abandon the seat? I am not even sure that he could have done so; and it certainly does not seem to me to be reasonable to expect him to apply for leave to do so, or to allow judgment to go by default. It was an accident that most of the expense had to be incurred before the result of the other petition became known. The offer which Mr. Davitt's counsel then made was a reasonable one; and though the Judges may have been quite right in requiring some evidence to be given,

Appeal. 1894. *In re* DAVITT. Fitz Gibbon, L.J.

and in refusing to allow the matter to be "settled," still I do not see why the second case was fought out as if the first had not taken place at all. For this Mr. Davitt cannot be, in any special sense, "justly held responsible."

Then it is said that the parties who got Mr. Davitt into the difficulty ought to get him out of it. Perhaps so; but they have not done so, and I cannot refuse his certificate, either because the people whom he trusted have failed him, or because he declines to beg the necessary money from them. If they are to be made liable, the law which they broke should be invoked directly, and the man whose seat they forfeited should not be left to suffer alone.

On the whole, I think that this is one of those cases to which this section was intended to apply; and, assuming that any bankrupt is not to be "justly held responsible" for his failure to pay 10*s.* in the pound upon his proved and lawful debts, I am of opinion that this bankrupt is entitled to his certificate of conformity.

BARRY, L.J.:—

I concur with the Lord Chancellor, the Master of the Rolls, and Fitz Gibbon, L.J., in thinking that the decision of Boyd, J., should be reversed, understanding that the decision of this Court is that the certificate of conformity under our Act of 1872 is not the equivalent of the special certificate mentioned in sect. 32 of the English Act of 1883.

Interpreting that peculiar word "justly" as well as we can, I think there are circumstances here for which Davitt cannot justly be held responsible. The word "justly" in that context is about as vague a word as could be found, and it certainly does afford an immense field for metaphysical distinctions. I thought one attempt of Mr. Carton's came rather near it—"fairly and properly, having regard to all the circumstances"; but the exception taken to that by Fitz Gibbon, L.J., was, that it merely used eight or nine words as equivalent to one. It brought it very near the argument that the word "justly" in our Act of 1872, and the corresponding section of the English Act of 1869, is translated in the Act of 1883 legislatively as "misfortune without misconduct,"

which would be rather a dangerous point for Mr. Davitt, as shown in the language of the judges in *Lord Colin Campbell's Case* (1).

Appeal. 1894. *In re* DAVITT.

I agree in thinking that the order appealed from should be reversed.

Solicitor for the bankrupt: *P. A. Chance.*
Solicitor for the assignees: *Friery.*

R. D. M.

IN THE MATTER OF THE ESTATE OF ROBERT BELTON, OWNER AND PETITIONER.

Monroe, J. 1894. May 8, 11.

Statute of Limitations—Fund in Court—Annuity—Absolute order for sale.

After the sale by the Court of lands, upon which an annuity was charged, part of the purchase-money was retained, and the dividends thereof were applied in part payment of the annuity, which they were insufficient to discharge in full:—

Held, that the annuitant was entitled at any time to resort to the *corpus* to pay the portion of the annuity remaining unpaid, and that the Statute of Limitations did not apply.

MOTION on behalf of Maria Browne, administratrix of Sarah Cole, deceased, for payment and transfer to her out of the funds in Court of the sum of £1681 14*s.* 7*d.* New Consols, and £25 3*s.* 11*d.* cash, in part discharge of alleged arrears of an annuity of £150, and cross motion on behalf of Richard Carmichael Belton, for payment and transfer to him of the said sums.

Roche, Q.C. and *Denning*, for Maria Browne.

Piers F. White, Q.C., *Matheson, Q.C.*, and *John Leech*, for R. C. Belton.

W. M. Jellett appeared for the next-of-kin of Martha Cole and Sarah Cole, but was not heard.

(1) 20 Q. B. Div. 816.

Monroe, J.
1894.
In re
BELTON'S
ESTATE.
May 11.

The facts of the case, and the arguments of counsel, will be found sufficiently stated in the judgment of Mr. Justice Monroe.

MONROE, J. :—

By his will, bearing date, the 9th November, 1841, Samuel Belton gave an annuity of £150 to trustees in trust for his three nieces, Catherine, Martha, and Sarah Cole, for their lives, or the life of the survivor, £50 each to be paid to them while they survived, £75 each to two surviving and £150 to the last survivor. He directed that this annuity should be a first charge on all his estates: but he declared his will to be that the annuity or annuities should, in the first instance, be paid out of the lands of Kilbride, in the King's County, and his houses and premises in and near Tullamore. Subject to the annuities he devised to Robert Belton, for life, the lands of Templemore, in the King's County, the lands of Bridswell, in the county of Meath, and the houses and premises in and near Tullamore, with remainder to Samuel Belton absolutely. The other lands charged with the same annuity were given to James, Thomas, and Richard C. Belton.

Robert Belton entered into possession of the lands devised to him, on the death of the testator in the year 1845; and in the year 1854 he presented a petition for sale of the King's County lands alone. These lands were sold under an order of the Incumbered Estates Court on the 10th April, 1854.

Catherine Cole, one of the annuitants died prior to the year 1857, and it is not alleged that any arrears of her annuity were due at the time of her death.

The arrears of these annuities up to the 27th March, 1857, were paid to Martha and Sarah out of funds, then standing to the credit of the matter, pursuant to an order of Court.

By a further order of the 2nd May, 1863, the sum of £45 11*s.* 2*d.* being the dividend on the sum of £1681 14*s.* 7*d.*, stock then standing to the credit of this matter, was directed to be paid to Martha and Sarah Cole, in part payment of £150, one year's gale of their annuities (No. 9, on the Schedule), which had fallen due on the 27th day of March then last, and it was further directed that all future dividends on the stock should be paid yearly from time to

time to Martha and Sarah in part discharge of the accruing gales of their annuities.

The dividends amounting to about £45 a-year were paid under this order down to the year 1870. No further payment was made till the month of February, 1890. Martha Cole died on the 20th November, 1872, intestate, and letters of administration were granted to Sarah on the 4th March, 1890. The dividends which had accrued on the stock up to the 21st December, 1889, amounted to £961 5*s.* 8*d.*, and by an order of the 5th February, 1890, £887 2*s.* 7*d.* was paid to Sarah, in her own right, and by a further order of the 16th April, 1890, a sum of £74 3*s.* was paid to her as administratrix of Martha.

Sarah Cole died on the 12th June, 1893, intestate, and on the 14th July, 1893, letters of administration to Sarah Cole were granted to Maria Browne, who on the 25th August, 1893, also obtained letters of administration *de bonis non* to Martha Cole. The dividends which accrued due on the stock from December, 1889, to the 12th June, 1893, were paid to Sarah Cole, or Maria Browne, and there is now standing to the credit of this matter £25 3*s.* 11*d.* cash and £1681 14*s.* 7*d.* stock.

In the month of June, 1882, Thomas Belton and Richard Carmichael Belton instituted a motion to have it declared that they were entitled to the stock and by an order of the 22nd June, 1882, made by Judge Ormsby, it was referred to the examiner to ascertain their rights and report thereon. The examiner reported on the 25th July, 1882, that the stock belonged to Richard Carmichael Belton subject to the annuity created by the will of 1841, and appearing at No. 9 on the schedule. This report was put on the schedule as a determination of the rights of the parties. Maria Browne now applies to have the stock sold, and the proceeds paid to her. She alleges that the amount which has accrued due on foot of the annuity since 1870 is £3375, that the amount paid in the shape of dividends amounted only to £1091 8*s.* 8*d.* and that there remains due the sum of £2283 11*s.* 4*d.*

A cross notice has been served by Richard C. Belton that the proceeds of the stock should be paid to him.

The counsel for Mr. Belton argue in this way. They do not deny that the lands sold in this matter were liable to the annuity.

Monroe, J. 1894. *In re* BELTON'S ESTATE.

As the lands were sold discharged of the annuity, they do not deny that originally the annuity was a charge on the proceeds of the sale in its proper priority. They say that the course for the annuitants to have adopted was, when the dividends proved insufficient in 1870 to meet the arrears of the annuity, they should have applied to sell out a portion of the stock to make up the deficiency, and that from the time they failed to pursue this course the statute of limitations began to run against them, so that although they might obtain the dividends, they were ultimately debarred from proceeding against the *corpus* of the fund. They say, secondly, that even if the statute of limitations cannot apply, the annuitants, by taking the dividends only, have abandoned their claim to the *corpus* and have acquiesced in limiting their claims to the dividends alone. They say, at all events, that their action throughout is evidence of an agreement or arrangement whereby on getting the dividends they consented to let the owner or his assignees have the principal to himself; and that in no case can the annuitants recover more than six years arrears.

Let us see, then, how the matter stands. The order for sale of the lands was made in the year 1854. The sale appears to have taken place in the same year, and the purchase-money was duly lodged to the credit of the matter. The order for sale (*Nixon's Estate* (1)) amounted to a conversion of land into money, and an order for distribution of the money among the incumbrancers, that is to say among those whose claims then, *i.e.* at the date of the order, bound the land. When the order for sale was made the annuity of £150 was a valid charge on the land and became a valid charge on the purchase-money. The claim appeared in the schedule in its proper priority. Had it been a fixed money demand instead of an annuity the amount would have been paid at once, if the money in Court were sufficient; or on account, if insufficient. Where lands are sold discharged of an annuity, the ordinary practice of the Court is, if the price of the annuity is not arranged by consent, to retain in Court a sum, the interest of which is considered sufficient to pay the gales of the annuity as they accrue due. If the interest on the sum retained be insufficient to

(1) Ir. R. 9 Eq. 15.

pay the accruing gale the annuitant is at liberty to apply for sale of so much of the invested fund as may be sufficient to pay up the arrears. But the money so kept in Court is the annuitants' security. If the annuity is a valid charge when the order for sale is made it continues to be a valid charge till the Court has done its duty in distributing the purchase-money. Once the order for sale is made the statute of limitations ceases to run. Therefore if the stock, representing £1681 14*s.* 7*d.*, continued from 1854 down to the present time in Court, without any payment having been made to the annuitants up to the death of the survivor, there can be no doubt but that neither stock nor dividends could be parted with until all arrears of the annuity had been paid. The contention, as I understand it is, that once the annuitant begins to take dividends without calling for the sale of sufficient stock to make up any arrears of the annuity which the dividends may be unable to satisfy, the statute of limitations begins to run as against any right to the *corpus* of the fund, or if the statute does not run, that there is such laches as to prevent the annuitant from looking to any security other than the dividends. I can see nothing to set up the statute of limitations, merely because the annuitant is satisfied to take the dividends and leave the fund untouched. Nor is there anything amounting to laches on the part of the annuitants in not applying for sale of sufficient of the stock to make up their annuities from year to year. They might consider themselves better off leaving the fund in Court and getting the dividend on the whole than in getting out small portions at a time and re-investing in some other or the same security.

If the statute of limitations ceased to run when the order for sale was made absolute there is no validity in the contention that only six years' arrears of the annuity are now recoverable. The arrears due within six years before the order for sale and all arrears which subsequently accrued up to the death of the surviving annuitant, after giving credit for payments of dividend, must be discharged so far as the fund in Court enables this to be done. The fund in Court is not sufficient to pay these arrears in full. Many cases were cited on behalf of Mr. Belton, but few of them had any application to the present one. *Blake* v. *Gale* (1), dealt

(1) 22 Ch. Div. 820.

Monroe, J. 1894. *In re* BELTON'S ESTATE.

with the question as to when the statute of limitations began to run in favour of executors who had been guilty of a *devastavit*. *In re Nugent's Trusts* (1) was cited merely to show that payment into Court under the Trustee Relief Act does not prejudice any rights, and that the Court is not thereby constituted an express trustee for the claimant to the fund. In *Re Stead's Mortgaged Estates* (2) the point was this. Certain lands subject to a mortgage were purchased by the Corporation of Leeds under the Improvement Act, and the purchase-money was lodged in Court. The mortgagee had received no interest for many years, and claimed to have the full amount of interest from the date of the advance paid to him, on the ground that the application to the Court of Chancery for payment out of a fund in Court was not an action or suit within the meaning of the statute of limitations. The Court held that the petition was analogous to a suit for the recovery of land, and therefore that the principal and six years' interest could alone be recovered. The same principle would be acknowledged in this Court where only six years' interest prior to the filing of the petition would be allowed to a mortgagee. But there is nothing to prevent a mortgagee from claiming against the purchase-money of lands in Court, his annual interest up to the time of payment. *Hughes* v. *Coles* (3) has no application to the present case. It dealt rather with the effect to be given to the 10th section of the 37 & 38 Vict. c. 57.

All these cases are distinguishable on the broad ground that we are here dealing with a fund in Court, held by the Court for distribution among incumbrancers, according to their priority.

The present case is governed by the principle established by *Colclough's Estate* (4) and *Nixon's Estate* (5), followed in this Court by *Moore's Estate* (6), *Irish Land Commission* v. *Davies* (7), *Ebbs' Estate* (8), and many others. Indeed, a considerable portion of the arguments of Mr. White and Mr. Matheson is met by the case of *Pepper's Trusts* (9), which was not one concerned with a fund

(1) 19 L. R. Ir. 140.
(2) 2 Ch. Div. 713.
(3) 27 Ch. Div. 231.
(4) 8 Ir. Ch. R. 330.
(5) Ir. R. 9 Eq. 7.
(6) 19 L. R. Ir. 365.
(7) 27 L. R. Ir. 334.
(8) 31 L. R. Ir. 95.
(9) 13 L. R. Ir. 108.

in Court at all. There, under a marriage settlement, executed on the 29th January, 1821, two sums, making together £4000, were vested in trustees, in trust to pay the income to the husband for life, and after his death, in case the wife survived him, to pay to her, out of the income, £200 (Irish) for her life, and after the death of the husband, subject to the annuity, in trust for the issue of the marriage. At the time of the marriage the £4000 was invested so as to carry interest at the rate of 6 per cent. Subsequently these investments were changed for Government stock, and the dividends being insufficient to pay the annuity, arrears accrued. For nearly twelve years after the husband's death the wife took the dividends on the stock without seeking to have them supplemented by realizing part of the trust fund. On her death her executors were held entitled to be paid out of the *corpus* of the trust fund a sum of money amounting to the difference between the dividends on the stock and the £200 annuity, annually during the eleven and a-half years that the wife survived the husband.

It is quite possible Sarah Cole never intended to claim the principal as against her relative, Mr. Belton; but she took no steps to assign it, and her administratrix is now entitled to claim the arrears of her annuity.

I must therefore refer it to the Examiner to inquire and ascertain how much is due to Maria Browne on foot of the £150 annuity: (1) as administratrix of Martha Cole, and (2) as administratrix of Sarah Cole. I must direct the amount found to be due to be paid out of the proceeds of the stock and cash in Court, in so far as they will extend, and, for this purpose, that, if necessary, the stock be sold. Should any surplus remain, same to be paid to Richard Carmichael Belton. Each party to abide his or her own costs.

Solicitors for Maria Brown: *Hoey & Denning.*
Solicitors for R. C. Belton: *Crookshank, Leech, & Davies.*

W. G.

M. R.
1893.

BOLAND *v.* DONNELLY.

March 6, 17. *Costs and fees in Supreme Court—Rules of* 1893*—Administration and trading accounts—"Instructions"—Allowance in excess of* £5*—Principles in estimating—Jurisdiction.*

Where fees above £5 are to be allowed for "instructions," as prescribed by the schedule of costs and fees in Supreme Court proceedings, under the Rules of 1893, as a rule the duty is thrown on the Judge of fixing what is the proper amount of remuneration to be allowed.

Semble. In a proper case it is open to the Judge to delegate to the Taxing Officer the duty of fixing the amount to be allowed, subject to the right of appeal from his decision.

In the case of a very large estate, where there was a large and unusual amount of trouble and difficulty connected with the administration and trading accounts, and where there were other exceptional circumstances, £500 was allowed as fees for instructions for the preparation of the accounts and affidavits vouching the same.

Motion on behalf of Mr. Campbell, the solicitor for the defendants in the action, which was one for the administration of the estate of Patrick Boland, deceased, and of the estate of Mary Boland his wife, for an order that the Taxing Officer to whom the costs in this matter had been assigned might be declared at liberty, notwithstanding the schedule of fees, to allow such sum in respect of the defendants' solicitor's charges for instructions for preparation of the several accounts and affidavits already filed in the matter as in the discretion of the said Taxing Officer should seem meet.

The circumstances connected with the hearing of the application, and the facts of the case so far as they are material, are fully explained in the judgment of the Master of the Rolls.

Carton, Q.C. and *Philip White*, in support of the application.

The Solicitor-General, for the plaintiffs.

March 17. The Master of the Rolls :—

This matter came before me, in the first instance, on an application for an order that the Taxing Master to whom the costs in

the matter had been assigned "may be at liberty, notwithstanding the schedule of fees, to allow such sum in respect of the defendants' solicitor's charges for instructions for preparation of the several accounts and affidavits already filed in this matter as in the discretion of the Taxing Officer shall seem meet."

I came to the conclusion that it was not the proper course to send the matter back to the Taxing Officer. The Taxing Officer has a discretion to allow fees for "instructions" up to but not exceeding £5, and if fees are to be allowed above that limit the matter must be brought before the Judge, and, in my opinion, the duty is thrown on the Judge of fixing what is the proper amount of remuneration. I do not mean to say that, as a matter of jurisdiction, it would not be open to the Judge, in a proper case, to delegate to the Taxing Officer the duty of fixing the amount to be allowed. The new amended rule, however, was intended to prevent allowances of large sums by the Taxing Master without judicial decision. No doubt, if under an authority delegated to him by the Judge, the Taxing Master fixed an amount in this way, the parties might bring the matter before the Judge by way of appeal from his finding; but in a great many cases this would afford little or no protection, as in this case—where the parties are friendly and the funds to be distributed are large, and where the exercise of a wide liberality might, I am aware, be sanctioned by both sides. I therefore think that the course which I feel constrained to adopt in the matter is the very thing which the rule was intended to provide for, as it had come to the knowledge of the Judges that in certain cases fees were charged against the parties of startling amount, without any judicial order. In one case £500 was allowed for "instructions" and the matter never came before the Court. In another, which I never heard of till it was mentioned during the argument, £750 is stated to have been allowed. I therefore consider I should decide the matter myself. When it came before me in the form I have mentioned, it was assumed that it was only necessary to make a *prima facie* case to show that the fees that should be allowed for "instructions" were above the jurisdiction of the Taxing Master, and that then the matter should be sent back to him with unfettered discretion; but it has now, owing to the view I expressed, become necessary to

M. R. 1893. BOLAND *v.* DONNELLY.

make a fuller case and to show the grounds of the very large charge which has been put forward by Mr. Campbell. The amount claimed is £1050, and that does not by any means exhaust the remuneration of the solicitor in reference to the accounts, because in addition to that he is entitled to very large sums for the preparation of the accounts, and not only so, but he has been also allowed very considerable sums for drafting and engrossing these same accounts. These, amounting in all to some £450, have all been allowed by the Taxing Master, and none of them, except the charge for "instructions," are now before me. And in exercising a large liberality in reference to the other items, I see nothing to complain of in the way the Taxing Master has treated the case. There was a large pecuniary interest involved in the matter. It dealt with the administration of the estate of Patrick Boland, and afterwards with the estate of his wife Mary Boland, who carried on a successful business, and the estate turned out very wealthy. The deceased was a large baker in this city, and carried on several different establishments in connexion with the business, which appear to have been treated as distinct establishments, with the result of causing complexity in the accounts relating to the property, and the interest, goodwill, and stores in the business premises. The establishments were sold by the Court, pending these proceedings, for £250,000, and there were other large assets which would bring up the value of the estate to £300,000 at any rate. The parties are friendly. The trustees are gentlemen of eminence and of the highest character, and have exercised much care in the interests of the minor children, of whom they are relatives; and it is a case for liberality in the taxation of costs incurred in the suit. It is not a case where there are debts to be paid or creditors to be satisfied or where there is impending penury threatening those beneficially interested, so as to render rigorous economy necessary. There is also the circumstance that in consequence of the sale of the property the remuneration of the solicitor has been the exceedingly large fee of £1002 10*s.*, which has been taxed and allowed under the Solicitors' Remuneration Act for conveyance and the duties connected with it, and if that sum affords a large margin of profit to him, it is the good fortune of the solicitor who was engaged in the transaction, and I have neither the power nor

the inclination to interfere with this allowance which has been made.

The question still remains as to £1050 charged at item 819 for "instructions." The administration and trading accounts are not of a very enormous bulk in themselves. The size and volume of the accounts is not of the first importance, but their complexity is: and there was undoubtedly a great deal of trouble connected with their preparation, as the facts were afterwards condensed, and the mere bulk cannot supply any complete test; what is a fair and reasonable remuneration must be more or less a matter of opinion and speculation in each case. During the argument I gave an opportunity to the parties to furnish me with any test for determining what reasonable amount ought to be allowed. One test presented was that the solicitor for the minors had been awarded and paid £400 for "perusing" these same accounts. That matter did not come before me at all. This suit, from what I have seen of it, is not a case in which any party would desire to appeal from taxation; and, in the second place, that solicitor was fortunate enough to tax these costs before the new rule came into operation, and he was consequently allowed this charge without any judicial action in relation to it, nor does it afford any reasonable ground on which to build an opinion as to the present claim before me or to apply any stated ratio in reference to this question at all.

Mr. Bailie, a member of a firm of chartered accountants, has stated in his affidavit that if his firm had been employed to prepare the accounts in a similar detailed form to that in which they have been prepared they would have charged £750, which charge would have included the necessary attendances to vouch and the furnishing of only one completed copy of each of the several accounts. Pausing on that affidavit, I may remark that it is my experience that gentlemen belonging to the respectable body of chartered accountants are not in the habit of placing an unduly low estimate on the value of their services, and in all cases where I have been asked to sanction the employment of accountants I have deemed it absolutely necessary to impose a strict limit beyond which their charges are not to extend, and never in any case that I can remember during the ten years in which I have

M. R. 1893. BOLAND v. DONNELLY.

sat here have I given an order authorizing their employment without placing that check in the interest of the parties to the suit. In this case Mr. Bailie says that the charge of £750 would have covered all charges for instructions, all charges for the preparation of one complete copy of each of the accounts, and all attendances requisite for vouching the accounts. And as regards the last element (on the assumption that this charge of £750 were a proper fee), it cannot be taken as a test, because these attendances for vouching have already been charged for separately, and there is consequently an item which cannot be included in the £1050 now claimed for instructions. Even dealing with the £750 as if the item could be properly included in the estimate of the chartered accountant, the estimate is arrived at without any competitive test as to what other persons would do, and taken as it is, does not err on the side of economy.

In trying to apply some rational test for guidance, it was suggested by the Solicitor-General that the proper course to take would be to calculate the expenses incurred by Mr. Campbell in reference to the accounts, and then add a fair percentage for profit which he suggested might be taken at 10 per cent. If I adopted that test, I should be doing a great injustice to Mr. Campbell, because the actual outlay in the matter could not adequately represent what ought to be the proper professional remuneration of a gentleman of standing in the profession selected by the guardians of this great estate. But assuming that the outlay affords some guidance in the matter, it is obvious that a solicitor would be entitled to something largely in excess of this, not only in respect of his professional position, but also of his office expenses, and everything connected with that position. It is necessary also to consider the responsibility which attaches to him in the matter. I cannot therefore adopt that as the only test in deciding the question, though it cannot be left out of consideration. And as regards this, I may point out that the rate of one shilling per folio has been allowed for drafting, and that rate of one shilling for 72 words is unusually remunerative in the case of long accounts, because each figure counts as a word. I do not know myself what exact steps the Taxing Master takes to ascertain the accuracy of the count of the folios, and I assume they are

all correct; but I do know that in a great many cases there is laxity about that matter; I have in several instances found this myself. But assuming that in each case these are correctly charged, the accounts consist of course mainly of figures, and there is a very substantial and handsome sum allowed for them, and one which leaves a large margin for professional profit. Before passing from the fee for preparation of the accounts which is intended in ordinary cases to cover everything connected with them, I may also notice that the copies are charged at the standard rate of 4*d.* a folio, and that largely consists of the solicitor's reasonable profit. Remuneration for the cost of scrivenery would not come to anything like that, and I have judicial knowledge that the scrivenery could be quite as well done, even by a type-writer, at a great deal less cost, one-fourth, or one-third, I believe. The rest is supposed to be the reasonable profit of the solicitor. I cannot, therefore, leave out of account that there is in addition to "instructions" a very large margin of profit charged in this bill and intended to cover a considerable portion of outlay which should be charged in respect of "instructions." I have made out what the cost of these documents would be with a view of testing the matter along with the affidavit of Bailie. He suggested £750 as the standard allowance. And while the costs of the first preparation would be, as I make it, £163, and in addition to that there would be the cost of drafting and the preparation of second copies, which would bring the amount, including everything, to £516 15*s.* 4*d.*; and if to that figure we add £750 the total would be £1266 15*s.* 4*d.*, and that would be in excess on the whole of the charge by the sum of £516 15*s.* 4*d.* But the estimate of £750 is too large, because on Bailie's own showing it included attendances to vouch; and I think, even assuming that the attendances would not be the broken and interrupted attendances which necessarily take place in the Chief Clerk's office (and which have been already charged for), still taking that into account, I am perfectly clear that a very much less sum then £750 would have been adequate to provide for this bill of costs. I do not take that as a test, and even if I were to do so, I think the estimate too high and too large, because the accountant would be employed in one particular case, and the information he derived would not be of any use in any other part of his

M. R. 1893. BOLAND *v.* DONNELLY.

mercantile life, whereas (as here) the information acquired has been of use and has been charged for under appropriate headings of preparations and attendances and so-forth. I am bound to look after the interest of the minors in this case and the important duty devolves on me of saying whether £1050 is a proper charge.

In my opinion, I am making a large and liberal allowance in only deducting from the £1050 claimed the sum of £550, and I wish it to be clearly understood that in allowing the residue of the charge, I am influenced by considerations which will have no application in most other cases. Mr. Campbell's chief assistant, himself a solicitor, has been almost constantly and exclusively employed for two years in working up these accounts. There has been some cash outlay in reference to them, including the employment, in the work of reconciling balances, of a professional accountant not separately charged for. The books of the several business concerns were numerous and badly kept. There has therefore been a very large and unusual amount of trouble and difficulty in the matter. The estate is very large, and the persons beneficially interested, other than the minors, make no objection to the exercise of liberality, while the guardians of the minors content themselves with submitting their rights to the Court. I am not without reason to believe that, had I not decided the matter myself, the claim might, and probably would, have been allowed in full. I am quite sure that the decision I have intimated does not err on the side of parsimony; and, for myself, I shall certainly not regard it as a precedent to be followed in cases where the elements to which I have referred are not all present in an equal degree.

Solicitor for the applicant: *The applicant in person.*
Solicitor for the plaintiffs: *M. J. White.*

R. W. L.

In the GOODS of HANLON.

Probate.
1893.
Dec. 18.

Will—Executor—Refusal to take out probate—Intermeddling with assets of deceased—Acts referable to office of executor.

K., who was priest of the parish where a deceased testatrix lived, and another clergyman, were appointed executors. K. attended the deceased, as her clergyman, on her death-bed, and at the time, or shortly afterwards, was handed (as he stated, for safe-keeping) by W. a sister of deceased, a bank deposit receipt for a sum of money in the joint names of herself and the deceased. According to the evidence he did not before this know of his appointment as executor. He was also given by W. certain sums of money, assets of the deceased. He deducted therefrom a sum of money to pay for the funeral office celebrated by him, and in respect of a legacy or gift for masses, &c., contained in the will, which he stated W. directed him to keep for these purposes. After these deductions the assets received by K. were returned to W., and were by her distributed to the legatees in a meeting held for that purpose in the vestry of the chapel of which K. was the parish priest. K. and the other clergyman named as executor were present at the distribution of the assets in the vestry. K. refused to take out probate of the will of the deceased:—

Held, that K. had interfered with the assets of the testatrix in such a way that he could not repudiate the office of executor, and that he was bound to extract probate of the will.

Motion.

By her will, made shortly before her death, which occurred on 12th April, 1893, Mrs. Margaret Hanlon, after giving and bequeathing certain legacies and bequests, appointed the Rev. Mr. Knaresboro and the Rev. Mr. Ratchford her executors. Previous to her death Mrs. Hanlon was a parishioner of the Rev. Mr. Knaresboro, and he attended her at her residence when dying, for the purpose of performing the rites of the Church. On that occasion Mrs. Whelan, who was a sister of the deceased and a legatee under her will, handed to Mr. Knaresboro a bank deposit receipt for £100 in the joint names of herself and the deceased, and on the day of the funeral office Mrs. Whelan gave Mr. Knaresboro a £50 note in payment therefor, and then handed

Probate. 1893. *In re* Hanlon.

him four £50 notes. In his affidavit, filed in reference to this application, Mr. Knaresboro stated that the bank deposit receipt and the money were handed to him by Mrs. Whelan, in order that he might hold them, pending arrangements to be made by her with the parties interested under the will, and he stated that they were received by him in his capacity as parish priest, and not as executor of the deceased. He further stated that after some days he handed back the deposit receipt and money to Mrs. Whelan, less a sum of £37, which she told him had been bequeathed by the deceased for masses, an office, and a "station of the cross" for the church. He further stated that he never acted as the executor of the will of the deceased, but that, as soon as he heard he had been appointed executor he stated that he could not act.

There was a meeting of the parties interested under the will of the deceased in the vestry of the chapel of the parish, the Rev. Mr. Knaresboro and the other executor named in the will being present, and the money was then distributed amongst the legatees, according to the terms of the will, by Mrs. Whelan.

On the 27th July, 1893, Mr. Stuart, acting as solicitor for James Phelan, who claimed to be a creditor of the deceased, wrote to the Rev. Mr. Knaresboro, asking him for a copy of the will of deceased, and stating that he had been informed that he was the executor of it, and requiring to know if it had been proved. In reply, Mr. Knaresboro wrote on the 31st July, saying that he was not aware, till after the decease of Mrs. Hanlon, that he had been appointed executor, that he had refused to act, and that he had no will, or copy of it, but that the will had been in the possession of Mrs. Whelan, a sister of the deceased.

On the 1st August Mr. Stuart wrote, stating that he had been informed that Mr. Knaresboro had, after Mrs. Hanlon's death, distributed the assets in accordance with the terms of her will, of which he was one of the executors, and called on him to take steps to have the will proved. In reply to this Mr. Knaresboro wrote, stating that he had not distributed any assets of the deceased, and that he refused to act as executor, and had written to that effect on the back of the will, and that Mrs. Whelan undertook all responsibility, and paid the persons who were beneficiaries under

the will, receiving receipts in her own name, and he refused to take any further action in the matter.

On the 13th November, 1893, a citation was issued to the Rev. Mr. Knaresboro to prove the will, and an appearance was entered thereto on his behalf without prejudice to his right to contend that he did not intermeddle with the assets of the deceased. This appearance was subsequently withdrawn, and a notice served of the filing of an affidavit by the Rev. Mr. Knaresboro in reply to the affidavit of James Phelan. The notice also stated that Mr. Knaresboro did not accept probate of the will of the deceased.

On the 18th December, 1893, an application was made on behalf of James Phelan, as a creditor of the estate and assets of the deceased, for an order that the Rev. Richard Knaresboro, one of the executors named in the will of Margaret Hanlon, deceased, should, within a time to be named by the President of the Probate and Matrimonial Division, proceed to extract probate of the will of the said deceased.

Campbell, Q.C. (with him *Jefferson*), in support of the application :—

Any interference with the property of a testator binds the executor to the office, and any act showing an intention to take upon him the executorship prevents an executor renouncing: Williams on Executors, p. 228; *Long* v. *Symes* (1); *Goods of Badenach* (2).

In the present case the Rev. Mr. Knaresboro knew he was appointed executor, and received the assets into his possession. He actively interfered in and directed the distribution of these assets, and the Court will oblige him to prove the will. The whole matter was arranged between him and Mrs. Whelan. At any rate, he was present at the meeting of the beneficiaries under the will, and assented to the distribution of the money, which was immediately before this in his own custody. He has intermeddled with the effects of the testatrix to such an extent as would constitute him an executor *de son tort*, and he will therefore be compelled to extract probate: *Rayner* v. *Green* (3).

(1) 3 Hagg. 771. (2) 3 Sw. & Tr. 465. (3) 2 Curt. 248.

Probate. 1893. *In re* HANLON.

In *Orr* v. *Newton* (1), where a person named as executor in a will was not compelled to prove it, there was no active interference in reference to the estate of the deceased proved against him, nor any receipt of the assets or payment away by him.

Cherry, contra :—

The Rev. Mr. Knaresboro was the clergyman who attended the deceased in her last illness. She was his parishioner. In his capacity as clergyman he received the deposit receipt from Mrs. Whelan, as also the money, for safe-keeping, and there is no contradiction of his statement that these assets were merely given to him to be held pending arrangements to be made by the principal legatee for settling-up matters. The fact of his presence at the time that the legacies were paid by Mrs. Whelan is no proof of any intermeddling so as to place him in the position of an executor *de son tort*. He swears that he repudiated the executorship as soon as he was aware of his appointment as executor, and that he never acted as such. He was, no doubt, the proper person to receive the money bequeathed for masses, but the fact of his receipt of this bequest does not alter his position. In the cases cited by Mr. Campbell, where applications similar to the present were granted, there were acts done which could alone be referable to the office of executor. [Counsel cited *M'Donnell* v. *Prendergast* (2) and *Jackson* v. *Whitehead* (3).]

THE PRESIDENT :—

I reject the contention that the Rev. Mr. Knaresboro entered into a conspiracy for the purpose of depriving Mr. Campbell's client of his chance of recovering back his money. Having said this in justice to Mr. Knaresboro, the question remains, whether he is bound to prove the will or not. As a fact, he and another clergyman—either his own curate or the curate of another parish —were named as executors in the will of Mrs. Hanlon. He says he did not know of his appointment as executor till after Mrs. Hanlon's death, but he does not fix the time, and I draw the inference that he knew he was appointed executor at the time the first document was handed to him, which was shortly after the

(1) 2 Cox C. C. 274. (2) 3 Hagg. 212. (3) 3 Ph. 577.

death. The mere fact of taking the deposit receipt and the bank notes into his custody, although he knew he was appointed executor, would not of itself oblige him to prove the will. But having them in his possession, what follows? There is a meeting in the vestry of the chapel of the parties interested under the will, both the clergymen who were named as executors being present, and the assets were distributed. In what character, then, were the executors present at the distribution of the assets? I am bound to presume that they were both there in the character of executors, though one of them, at least, stated that he would not act as executor. Here we have present the executors and the person who was principally entitled under the will, Mrs. Whelan, and all the legatees, and the money was given back to Mrs. Whelan by the executor, Mr. Knaresboro; and then, in the presence of the two executors, the money, which had been in the possession of one of them, is distributed according to the terms of the will. He says, in his affidavit:—"The said Mary Whelan afterwards distributed the assets of the deceased, according to the terms of her will"—that is, in payment of legacies. In his presence that money, which he had in his hands, is distributed with his consent—probably by his advice and directions. And he receives himself money under the trusts of the will: he is paid £37 for masses, *i.e.* for his own benefit, subject to certain trusts. Mr. Cherry admits that the proper person to pay this to was the clergyman of the parish, who is the person entitled to receive it, and the person to whom the Court of Chancery would pay it, acting under this will. He was the person entitled; he knew that he was executor named in the will at the time, and he was acting in a way which he could not properly have done if he was not executor. I hold he must extract probate of the will.

Solicitor for the applicant: *W. B. Stuart.*
Solicitor for the Rev. Mr. Knaresboro: *M. Buggy.*

R. W. L.

INDEX.

ACCOUNTANT—Taking possession of property of arranging debtor—Resolution of creditors—Contempt of Court - - 335
See ARRANGING DEBTOR.

ACCOUNTS—Instructions—Costs of—Principles in estimating - - - - 544
See COSTS. 1.

ACCUMULATION — *Will — Construction — Tenant for life, with power to appoint—Charge on estates—Trustees to pay charges and incumbrances out of accumulation of rents—Action for administration—Petition for sale in Land Judge's Court.*] *H.*, who was owner of the *R.* and *B.* estates for life, with a power of appointment, subject to a charge of £10,000 on those estates created by a settlement of the 20th January, 1885, and secured by a term of 1000 years, made his will, dated the 30th November, 1886, by which he devised the estates to his daughter for life, with remainder in tail male, and with divers remainders over. The will contained a forfeiture clause, in the event of his daughter marrying in the lifetime of her mother without her consent in writing, in which event (which afterwards happened) he directed that his daughter should thenceforth hold the estates upon trust for the testator's wife during the joint lives of her and his daughter; and in the event (which happened) of his wife dying in the lifetime of the daughter, in trust to pay to or permit the rents to be received by the trustees of the will until a child of his daughter should attain twenty-one, if such event should happen in her life; and he directed that the rents should be invested and accumulated, and that upon the death of his daughter, or as soon as a child should attain twenty-one, whichever should first happen, the trustees should apply the accumulated fund in payment of the charges affecting the estates, without regard to priority. The testator then bequeathed the charge of £10,000 to his wife absolutely, expressing a wish that she should release her life estate in the charge. The testator died on the 10th June, 1888. The daughter married in May, 1890, without the consent of her mother, whereupon Mrs. *H.* entered into possession

ACCUMULATION—*continued.*

of the estates. Mrs. *H.* died in May, 1893, having, by a codicil to her will, directed that the surplus of her personal estate, after payment of certain egacies, should be devoted to pay off or reduce the incumbrances on the *R.* estate. There was one child issue of the marriage of the testator's daughter, and an action was brought on the 30th May, 1893, to administer the real and personal estate of *H.* On the 8th June, 1893, the statement of claim was delivered. On the 23rd June the executors of *H.* filed their defence, and on the 1st July the executors of Mrs. *H.* filed their defence. On the 4th July, 1893, the executors of Mrs. *H.* presented a petition for the sale of the *R.* and *B.* estates to the Land Judge's Court. On the 20th July the Master of the Rolls made a decree for administration, directing the ordinary accounts, and inserted a declaration that the persons claiming under the will of the testator as specific legatees of incumbrances affecting the *R.* and *B.* estates, were bound to accept payment of such incumbrances under the trusts of the will for the discharge thereof, by receipt and accumulation of rents or otherwise, as the Court might direct:—*Held* (varying the decree of Porter, M.R.), that this declaration should be omitted, as the Court had no jurisdiction to restrain proceedings in the Court of the Land Judge; but leave was given to the minor to use the name of the trustees in showing cause against making absolute the order for sale. *King-Harman* v. *Cayley*
[APP. 355

ADEMPTION — *Will — Construction — Hotchpot clause.*] A testator, by a codicil to his will, directed certain moneys to be brought into hotchpot with portions bequeathed by his will to younger children:—*Held*, that there was no ademption of any part of the portions by reason of this direction. *In re Tyrell; Chamier* v. *Tyrell* - - V.-C. 267

ADMINISTRATION—Obtained to make title to money paid into Court—Lands Clauses Act, s. 80 - - - - 146
See COMPULSORY PURCHASE. 1.

ADMINISTRATION ACTION—Accounts—Instructions for—Costs - - 544
See Costs. 1.
—— Decree—Collateral issue - 274, 298
See Estoppel.
—— Failure to lodge certified balance—Fiduciary relation - - - - - 63
See Attachment.
—— Sale of mortgaged property—Deficiency—Costs, - - - - - 316, 319
See Costs. 2.
AFFIDAVIT—Registration of deed—Verifying execution by grantee only - 488
See Registration of Deed.
—— Registration of judgment mortgage—Description of lands - - - - 408
See Judgment Mortgage.
AGISTMENT—Grazing rents—Sale in Land Judge's Court - - 261, 266
See Sale, Land Judge.
AGREEMENT FIXING FAIR RENT—Lease for lives—Devolution of tenant's interest - - - - - 65
See Fair Rent.
AGREEMENT FOR HIRE - 235, 240
See Hiring Agreement.
ANNUITY—Sale, Land Judge's Court—Absolute order—Statute of Limitations - 537
See Limitations, Statute of.
ANTICIPATION—Invention—Patent 417
See Patent.
ANALOGOUS USE—Invention—Novelty 417
See Patent.

APPEAL—*From County Court—Practice—Objection to decree not raised by cross-appeal.*] Where a party in an equity civil-bill action appeals from so much only of an order of the County Court as is unfavourable to himself, his adversary cannot, in the absence of a cross-appeal, question the validity of the order. Where a plaintiff in an equity civil-bill for specific performance obtained a decree, but appealed from so much of it as charged him with interest on purchase-money, and refused him damages:—*Held*, that it was not competent for the defendant, who had not appealed, to impeach the decree on grounds which would have afforded a defence in the Court below. *Keenahan* v. *Gannon* [Monroe, J. 412

—— Rejection of evidence - - - 417
See Patent.

ARRANGING DEBTOR—*Protection order—Declaration that petitioner should not part with his estate—Accountant taking possession under resolution of creditors—Contempt of Court—Jurisdiction—Bankrupt and Insolvent Act*, 1857, *ss.* 343, 344, *—Bankruptcy Amendment Act*, 1872, *sect.* 68.] A trader presented a petition to the Court of Bankruptcy, stating that he was unable to meet his engagements with his creditors, that he desired to lay the state of his affairs before them, under the control of the Court, and submit himself to the jurisdiction thereof; that his embarrassment was due to losses resulting from bad debts and depression of trade. The petitioner then declared that he submitted himself to the jurisdiction of the Court, and prayed that an order might be made protecting his person and property from process, and that any arrangement which he might make with his creditors might be executed under the direction of the Court. On hearing this petition the Court made two orders of the same date, one drawn up on paper and the other on parchment. The former decreed that the person and property of the petitioner should be protected until a day named, or until further order; and having arranged, amongst other formal matters, for holding a private sitting and a preliminary meeting, directed the petitioner not to make any payment, or part with any portion of his property, except for the ordinary purposes of his trade, without the sanction of the Court, and that he should not (except as aforesaid) give possession of, or part with, any portion of his property to any person other than the official assignees or messenger of the Court, without like sanction. The parchment order simply declared that the person and property of the petitioner was protected from process till a day named, or until further order. The petitioner failed to attend the preliminary meeting of his creditors, which was accordingly adjourned. At the meeting it was resolved that, pending the adjournment, a firm of accountants should enter into possession of the estate. A member of the firm, who had knowledge of the order of the Court, acting under this resolution, took possession of the estate. The adjourned meeting was then held, and the matter was turned into bankruptcy:—*Held*, affirming the decision of Miller, J. (*diss.* Barry, L.J.), that the member of the firm taking possession of the estate of the petitioning trader was guilty of contempt of Court. *Per* Barry, L.J., that the part of the order which declared that the trader should not part with the possession of his goods to any person except the officers of the Court was made outside the jurisdiction conferred by the 343rd section of the Act of 1857; that there was no undertaking to abide by it binding on the firm of accountants, and that, though the taking possession may have been illegal, it was not a contempt of Court. *In re Vahy* [App. 335

ATTACHMENT — *Non-lodgment of certified balance—Fiduciary relation.*] In an action to administer the personal estate of *P. T.*, deceased, the judgment on further consideration ordered the defendants, who were administrators with the will annexed of the widow of the deceased, to lodge in

ATTACHMENT—*continued.*
Court £310, the balance certified to be due by her to the estate. The defendants having failed to comply with the order, the plaintiff moved that they might be arrested and committed to prison for their contempt:—*Held*, that no fiduciary relation between the parties had been established, and therefore that an order for attachment could not be granted. *Taaffe* v. *Fitzsimons* - V.-C. 63

ATTENDANCE—Of country solicitor in Dublin—Costs—Taxation - - - 135
See TAXATION OF COSTS. 2.

BANKRUPTCY—*Certificate of conformity—Failure to pay* 10*s. in the pound—Circumstances for which the bankrupt could not be justly held responsible—Section* 56 *of the Bankruptcy* (*Ireland*) *Amendment Act*, 1872 (35 & 36 *Vict. c.* 58)—*Costs of an election petition.*] *D.* was invited to stand as a candidate at a Parliamentary election for North *M.*, and his expenses were provided. He accepted the invitation, issued his address, and made some speeches. On the 28th June, 1892, he was informed that the Roman Catholic Bishop of *M.* was about to issue a pastoral, and he requested that it should not be issued till after the election. The pastoral was issued on the 29th June. On the 7th July, *D.* was nominated along with *M.*; the election took place on the 15th July, and *D.* was returned by a majority. A petition was presented to declare the election void on the grounds of undue influence and intimidation, but before it was heard, a petition against the return of the candidate for South *M.*, on similar grounds, was decided on the 30th November, 1892, and the election was declared void. On the 15th December, 1892, when the petition against *D.*'s return came to be heard, an application was made by *D.*'s counsel to stay further proceedings, *D.* offering to give up the seat, but the Judges declined to accede to the application. The case was tried, the trial lasting for eight days, and *D.* was unseated, and ordered to pay the costs of *M.* The costs amounted to over £1800, and being unable to pay, he was adjudicated a bankrupt. He had substantially no other creditors, the total liabilities being £2061, and the assets £227. On an application by *D.* for his certificate of conformity:—*Held* (reversing the decision of Boyd, J.), that the inability of *D.* to pay 10*s.* in the £1 arose from other circumstances for which he could not be justly held responsible within the meaning of s. 56 of the Bankruptcy Act of 1872, and that he was entitled to his certificate of conformity. *In re Daritt* - APP. 517

—— Arranging debtor—Protection order—Contempt—Jurisdiction - - - 335
See ARRANGING DEBTOR.

—— Depositions — Admissibility against third party - - - - - 183
See DEPOSITIONS.

BANKRUPTCY—*continued.*
—— Order and disposition—Hiring agreement—Notoriousness - - - 235, 240
See HIRING AGREEMENT.

BEQUEST
See LEGACY.

BRIEFS—Copies of deeds—Extracts—Taxation of costs - - - - - 378
See TAXATION OF COSTS. 1.

BUILDING LEASE—Solicitors' Remuneration Act, 1881—General Order, 1884—Scale of charges - - - - - 503
See TAXATION OF COSTS. 3.

CASES—*Bailie's Estate, In re* (31 L. R. Ir. 98), considered - - - - - 1
See COMPENSATION.

—— *Barnewall's Estate, In re* (I. R. 1 Eq. 304), considered - - - - - 1
See COMPENSATION.

—— *Brünner, In re* (19 Q. B. Div. 572), distinguished - - - - - 183
See DEPOSITIONS.

—— *Burgess' Trusts, In re* (11 Ir Ch. R. 164), followed - - - - - 138
See DISTRIBUTIONS, STATUTE OF.

—— *Cradock* v. *Piper* (1 Mac N. & G. 664), rule in applied - - - - - 60
See SOLICITOR.

—— *Fox* v. *Fox* (L. R. 19 Eq. 286), considered - - - - - 69
See VESTED GIFT.

—— *Jack* d. *Rennick* v. *Armstrong* (1 H. & B. 727), followed - - - - 488
See REGISTRATION OF DEED.

—— *Kelly, Ex parte; In re City of Dublin Junction Railways* (31 L. R. Ir. 137), followed - - - - - 146
See COMPULSORY PURCHASE, 1.

—— *Natt, Re* (37 Ch. Div. 517), followed 93
See GIFT TO A CLASS. 1.

—— *Perrin* v. *Roe* (25 L. R. Ir. 37), followed 1
See COMPENSATION.

—— *Stephens' Estate, In re* (I. R. 10 Eq. 282), followed - - - - - 488
See REGISTRATION OF DEED.

—— *Wharton* v. *Barker* (4 K. & J. 483), followed - - - - - 93
See GIFT TO A CLASS. 1.

CERTIFICATE—Conformity—Failure to pay 10*s.* in the £ - - - - 517
See BANKRUPTCY.

CLASS—Gift to—Will—Construction - 32, 93
See GIFT TO A CLASS. 1, 2.

CODICIL—Unattested—Subsequent codicil not referring to, - - - - - 508
See EXECUTION OF WILL.

COMPANY—Winding-up—Restraining proceedings in foreign court - 321, 329
See WINDING-UP.

COMPENSATION—*Sale—Practice—Rental and conditions—Tithe rentcharge.*] Fee-simple property was put up for sale, subject to an annuity of £16 16*s.* payable to the Board of Works for twenty-one years, from 21st November, 1891. No other charge or incumbrance was mentioned in the particulars of sale. The conditions of sale contained the usual provision, that in the event of there being any error, misstatement, or omission in the particulars, compensation might be made to the purchaser, the amount of such compensation to be settled by the Judge at Chambers. The lands were subject to a tithe rentcharge of £3 2*s.* 4*d.* per annum, and the purchaser, on discovering this, applied for compensation:—*Held*, by Porter, M.R., that the purchaser was entitled to assume from the particulars that the lands were not subject to tithe rentcharge, and that he was entitled to compensation. *Perrin* v. *Roe* (25 L. R. Ir. 37), followed. *Barnewall's Estate* (Ir. R. 1 Eq. 304) and *Bailie's Estate* (31 L. R. Ir. 98) considered. *Hamilton* v. *Bates* - - - - - - M. R. 1

COMPULSORY PURCHASE—*Costs—Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 80—*Administration obtained, after payment into Court, for the purpose of making legal title.*] Leasehold premises belonging to *J. R.* were taken by a railway company under their compulsory powers. *J. R.*, who was then dead, had bequeathed the premises to his wife and six children, "share and share alike, the share of any individual dying to be equally divided amongst the survivors." No claim was made on behalf of the legatees for several years, until *E. R.*, the surviving legatee, lodged an abstract of title with the Company. The Company, not being satisfied with the title, lodged the purchase-money and interest in Court. *E. R.* applied for payment out of the fund. The Court held that the legatees were tenants in common of the property, and directed payment to *E. R.* of her share, and the shares of the six deceased legatees to be placed to separate credits, and ordered the Company to pay *E. R.* the costs of and incident to the application, order, and proceedings thereunder, and all costs, charges, and expenses properly payable under the Lands Clauses Acts. *E. R.* then took out administration to each of the deceased legatees, and obtained payment of their shares. The Taxing Master declined to allow the costs of taking out these administrations, as not being covered by the order:—*Held*, that the costs were properly payable by the Company, and that the order should be amended by inserting a declaration to that effect. *Ex parte Kelly* (31 L. R. Ir. 137), followed. *In re Midland Great Western (Ireland) Railway Co.; Ex parte Rorke*, - M. R. 146

2. —— *Lands Clauses Act—Payment out of Court—Title by possession.*] Money lodged in Court under the Land Clauses Acts paid out on a

COMPULSORY PURCHASE—*continued.*

title based on continued possession by a tenant without payment of rent for fifteen years after the expiration of his own and the next superior interest. *In re Blackrock Township Commissioners; Ex parte Forde* - - - - V. C. 156

CONDITIONS OF SALE—Chancery Division —Tithe rentcharge—Compensation 1
See COMPENSATION.

CONFORMITY—Certificate of—Failure to pay 10*s.* in the £1 - - - - 517
See BANKRUPTCY.

CONTEMPT—Court of Bankruptcy—Arrangement - - - - - 335
See ARRANGING DEBTOR.

—— Nonpayment into Court—Fiduciary relation
See ATTACHMENT. [63

CONTINGENCY—Death coupled with—Gift to survivors—Will—Construction - 299
See SURVIVOR. 1.

COPIES—Deeds—Briefing—Taxation of costs
See TAXATION OF COSTS. 1. [378

COSTS—*Administration and trading accounts—"Instructions"—Allowance in excess of £5—Principles in estimating—Jurisdiction.*] Where fees above £5 are to be allowed for "instructions," as prescribed by the schedule of costs and fees in Supreme Court Proceedings, under the Rules of 1893, as a rule the duty is thrown on the Judge of fixing what is the proper amount of remuneration to be allowed. *Semble.* In a proper case it is open to the Judge to delegate to the Taxing Officer the duty of fixing the amount to be allowed, subject to the right of appeal from his decision. In the case of a very large estate, where there was a large and unusual amount of trouble and difficulty connected with the administration and trading accounts, and where there were other exceptional circumstances, £500 was allowed as fees for instructions for the preparation of the accounts and affidavits vouching the same. *Boland* v. *Donnelly* - M. R. 544

2. —— *Administration suit—Sale of mortgaged property—Proceeds insufficient to pay mortgage debt—Other assets insufficient to pay costs—Costs of sale.*] In a creditor's suit for administration, the property of the deceased was sold in lots, some of which were subject to a mortgage. The mortgagee, who had not proved as an ordinary creditor, and was returned in the Chief Clerk's certificate only as an incumbrancer, was aware that the property was to be sold, and gave assistance in reference to title, &c. The lots subject to the mortgage did not realize sufficient to pay the amount due to the mortgagee, and the remainder of the assets was insufficient to pay the costs of suit, including those of the sale:—*Held*, by the Vice-Chancellor, that a proportionate part of the costs of the sale should be paid out of the amount realized by the sale of the lots subject to the mortgage. *Held*, by the Court

COSTS—*continued.*
of Appeal (reversing the decision of the Vice-Chancellor), that no part of the costs of the sale should be borne by the proceeds realized thereby. In a creditor's administration action the ordinary rule is that a mortgagee does not lose his priority by consenting to a sale of premises mortgaged to him by the deceased, nor does he thereby undertake to pay the costs of the sale in the event of there being a deficiency. *Hilliard* v. *Moriarty* [V.-C. 316; APP. 319
—— Compulsory purchase—Administration obtained to make title—Lands Clauses Act, s. 80 - - - - - - 146
See COMPULSORY PURCHASE. 1.
—— Election petition—Failure to pay 10*s.* in the £1—Bankruptcy—Certificate of conformity - - - - - - 517
See BANKRUPTCY.
—— One of several trustees acting as solicitor in relation to trust estate - - 60
See SOLICITOR.
—— Solicitor's lien
See SOLICITOR'S LIEN.
—— Taxation
See TAXATION OF COSTS.
—— Third party—Indemnity—Solicitor and client
See THIRD PARTY. [153
COUNTY COURT—Appeal - - 412
See APPEAL.
COUNTY INFIRMARY—*Salary of Surgeon—Grand Jury Acts*, 5 & 6 *Geo.* 3, *c.* 20 (*Ir.*), *ss.* 2, 5, 6; 45 *Geo.* 3, *c.* 111, *s.* 1; 6 & 7 *Wm.* 4, *c.* 116, *ss.* 85, 86—*Payment to surgeon out of private endowment of Infirmary of sum in addition to* £94 *a-year salary presented for by Grand Jury.*] The governors of a County Infirmary may, in the exercise of their discretion, apply funds, voluntarily subscribed, to increase the salary of the surgeon over the sum of £94 a-year, presented for by the Grand Jury, under 5 & 6 Geo. 3, c. 20 (Ir.) *Gibbon* v. *Wexford Infirmary* - - - - - - V.-C. 26
CROWN—Office held under—Trustee - 74
See TRUSTEE.
CUSTOM OF TRADE—Hiring agreement—Notoriousness - - - 235, 240
See HIRING AGREEMENT.
DEATH—Coupled with contingency—Gift to survivors - - - - - 299
See SURVIVOR. 1.
DECLARATION OF TRUST - - 56
See SURETY.
DEEDS—Copies—Extracts—Taxation of costs
See TAXATION OF COSTS. 1. [378
—— Registration of—Affidavit of execution by grantee only - - - - - 488
See REGISTRATION OF DEED.
DEMAND—Mortgage to be executed upon 488
See EQUITABLE MORTGAGE.
DEPOSITIONS—*Practice, Court of Bankruptcy—Admissibility against third party.*] Where property in the possession of the assignees was claimed by a third party:—*Held*, that depositions exclusively relating to the question of the property and signed by the witnesses were admissible in evidence against the claimant, where the claimant had notice of the examination of the witnesses, and was served with notice of the assignees' intention to use the depositions upon the hearing of the claim. *In re Brünner* (19 Q. B. Div. 572) distinguished. *In re Gavacan* - - BANKCY. 183
DEVISE—Gift to a class—"Then" living 32, 93
See GIFT TO A CLASS. 1, 2.
DISCRETION—Of trustees—Exercise of power—Control of Court - - - 74
See TRUSTEE.
DISTRIBUTIONS, STATUTE OF—*Settlement—Construction—Provision "in lieu of dower and thirds at common law or otherwise"—Widow's share under, whether barred.*] By marriage settlement, lands of the husband held for lease for lives renewable for ever, and lands of the wife held for a term of years, were settled upon trust, after the death of the husband, that the wife, in case she should survive him, should receive and take during her life for jointure in lieu, bar, and satisfaction of, all dower and thirds, to which she might at common law, or otherwise, be entitled, the annual sum of £50 charged upon all the said lands. The settlor died intestate as to portion of his personal estate, leaving his widow and two children surviving. *Held*, that the widow was barred from any share of the undisposed of personal estate. *In re Burgess' Trusts* (11 Ir. Ch. R. 164) followed. *In re Duigan*: *Coyne* v. *Duigan* - M. R. 138
DOMICIL—*Writ of summons—Service out of the jurisdiction—Abandonment of original domicil—Permanency of residence—Proof of intention—Acts indicating intention after threat of legal proceedings—R. S. C., Ireland*, 1891, *Order XI., Rule* 1.] *S.* was born in 1868 in Ireland, where his father was temporally located. In 1873 he returned with his father to England. In 1883 he went to Cannes to live with his uncle, by whom he was supported and maintained, and who had resided there for several years, following the profession of a teacher of languages. In 1887 *S.* came to Birmingham for the purposes of studying pharmacy. In the same year his father acquired an Irish domicil, having purchased a house in Ireland, where he resided with his family till the beginning of 1893, when he sold his property there. *S.* paid occasional visits to his father's home in Ireland. In 1890 he returned to his uncle at Cannes. On the 25th March, 1892, he married the plaintiff, who was the widow of a French gentleman, the ceremony being performed at the British Consulate at Nice. At the date of this marriage the plaintiff

DOMICIL—*continued.*
was entitled to considerable personal property, and some real estate in Jersey. Shortly after her marriage the plaintiff left *S.*, and, through her solicitor, threatened legal proceedings against him and his uncle, alleging that they (in breach of an antenuptial agreement) had obtained by fraud and violence a portion of her property, and had by similar means induced her to sign a bill of exchange or promissory note for 30,000 francs. Subsequently, by deed dated the 20th September, 1892, *S.* and his uncle entered into partnership with *H.*, to carry on a business at Cannes. On the 10th October following *S.* registered himself with the Mayor of Cannes as having declared his wish "*établir (ou) avoir établi sa residence à Cannes*":—*Held*, that *S.* was not "domiciled" within the jurisdiction, and that no writ could be served on him out of the jurisdiction. On the hearing of the application to discharge the order for service out of the jurisdiction an order was made by the Master of the Rolls for the attendance of the defendants for cross-examination on their affidavits in the case, on the terms that no legal process should be served on either of them coming to Ireland, remaining, or going away within a reasonable time. *Spurway* v. *Spurway* [M. R. 385 ; App. 401

ELECTION PETITION—Bankruptcy of unseated respondent—Certificate of conformity - - - - - - 517
See Bankruptcy.

ENTIRETIES—Trust of income—Husband and wife - - - - - - 267
See Husband and Wife.

EQUITABLE MORTGAGE — *Vagueness — Demand.*] 1. Agreement by *A.* with *C.*, as follows:—"In case I fail to pay you any promissory note or bill of exchange of mine, when due, I agree to execute to you a mortgage on all my houses and lands to secure to you the payment of all sums of money you may advance me on my promissory notes or bills of exchange, with interest, till paid, at such rate as may be provided by such promissory note or bill of exchange":—*Held*, to create a valid equitable mortgage on lands, the property of *A.* at the time of the agreement, for the amount of notes or bills remaining unpaid on maturity. 2. Agreement by *B.* with *C.*, as follows:—"In consideration of the advance this day made by you to me, I hereby agree that in case I fail to pay you any promissory note or bill of exchange of mine when due, I shall, upon demand, execute to you a mortgage on all my houses and lands, to secure to you the payment of all sums advanced, or to be advanced, by you to me on my promissory notes or bills of exchange, with interest, till paid, at such rate as may, in each case, be provided by such promissory notes or bills of exchange":—*Held*, to create, without any demand, a

EQUITABLE MORTGAGE—*continued.*
valid equitable mortgage on lands, the property of *B.* at the time of the agreement, for the amount of notes or bills unpaid at maturity, the words "on demand" having reference to the execution of a legal mortgage. *In re Hurley's Estate. In re Biddulph's Estate: Provincial Bank of Ireland (Limited), Petitioners* - - Monroe, J. 488

ESTOPPEL—Res judicata—*Judgment* in rem—*Judgment* inter partes—*Decree in administration suit—Collateral issue—Decree as to legitimacy—Proof of title.*] *P.* was entitled, under the will of his mother *M. S.*, to an annuity, devised by her to him his heirs and assigns for ever, and charged on certain real estate, of which (with other property) she was owner in fee. He lived and cohabited with *M.* from the commencement of the year 1818 till his death in 1823, and there were three children of such intercourse, of whom the eldest was *T.*, born in 1819, and the youngest *E.*, born in 1822. He died intestate as regards his real estate. Prior to 1836 a suit was instituted in the equity Exchequer for the general administration of the real and personal estate of *M. S.* *T.* filed a charge in the administration suit, claiming the annuity as the lawful son and heir-at-law of *P.* *D.*, the owner of the lands charged with the annuity as tenant in tail, disputed the claim and filed his answer by way of discharge. *T.*'s right to the annuity turned on the fact of a marriage alleged to have been celebrated between his parents *P.* and *M.* in 1818. The Remembrancer of the Court made a report, finding that *T.* was the lawful son and heir-at-law of *P.*, and as such entitled to the annuity charged on the lands. Exceptions to this finding were taken by *D.*, and an issue was directed to be tried as to whether *T.* was the lawful son and heir-at-law of *P.* or not. *T.* was plaintiff in the issue and *D.* the defendant. The jury disagreed, and the matter came again before the Equity Exchequer, and, by decree, dated 2nd May, 1840, the Court set aside the exceptions, on the ground that the owner of the lands charged could not, in any view, be entitled to the annuity, and confirmed the report of the Remembrancer "without prejudice to any original proceeding by any person who may conceive himself entitled to the said annuity for recovery thereof." Pursuant to the decree, the lands charged with the annuity were sold (subject to the annuity), and were conveyed to *L.* in 1845. In 1878 the lands were sold, subject to the annuity, in the Land Judge's Court, and conveyed by Landed Estates Court conveyance, dated 1879, to G. After the decree of 1840, *T.* remained in enjoyment of the annuity till his death in 1880. He died intestate and unmarried, and having survived his brother (the second child of *P.* and *M.*), who left no issue. Administration of the estate and effects of *T.* was granted to *E.*, who

ESTOPPEL—*continued.*
died in 1887. *G.* assigned the lands charged with the annuity, and conveyed to him by the Landed Estates Court conveyance, to the defendant, who was in possession and receipt of the rents and profits under such assignment. The executors of *E.* claimed payment of the arrears of the annuity charged on the lands by the will of *M. S.*, and a declaration that the annuity and the arrears thereof were well charged:—*Held*, that the defendant, as owner of the lands charged with the annuity was not estopped from denying that *E.* was the legitimate daughter of *P.*, and was entitled to demand proof of her claim by heirship. *Held*, also, that the decree of the Equity Exchequer in 1840 in the administration suit, on the question of the legitimacy of *T.*, was not an adjudication in the nature of a judgment *in rem*. A judgment *in rem* is a judgment by a Court having special jurisdiction over the subject-matter. *M'Donnell* v. *Alcorn*, [M.R., 274; APP. 298

—— Recital in deed - - - - - 56
See SURETY.

EVIDENCE—Depositions taken in bankruptcy—Admissibility against third party 183
See DEPOSITIONS.

—— Domicil—Change of—Intention 385, 401
See DOMICIL.

—— Extrinsic—Execution of power - 118
See EXECUTION OF POWER.

—— Rejection of—Appeal - - - 417
See PATENT.

EXECUTION OF POWER—*Appointment—Will—"Give and bequeath"—Reference to power—Disposition of residue—Estate of deceased—Extrinsic evidence.*] A testatrix by her will provided as follows:—"I confirm the gifts to my children" [naming them] "already given to them by deeds of appointment. I will and bequeath that the sum of £200 given my son *J.* (now deceased) by deed of appointment be paid to my son *H.* and *M.*, to hold in trust for my grandson *E.*, son of *J.*, which I direct my said executors to pay over to him at the age of twenty-one. I bequeath to my sons *F.* and *R.* each the sum of £300, and to *G.* the sum of £300. I give, bequeath, and devise the residue and remainder of my estate of whatsoever kind, and wheresoever situate, unto my sons *W.* and *E.* I hereby appoin my son *H.* and my daughter *M.* executors." After the attestation clause of the will, and before the names of the executors, there was the following clause:—"Any just debts and my funeral expenses (which I desire shall be of the simplest kind) I expect my son *H.* to see to." At the date of her will the testatrix was entitled for life, under her marriage settlement, to the dividends and interest of a fund, consisting of £2807 14*s.* 6*d.* New Consols, and a small sum of cash, with a power of appointment

EXECUTION OF POWER—*continued.*
over that portion of the fund which had not been previously appointed, and which, in default of appointment, was to go to the children living at her death. There had been previously four deeds of appointment, duly executed in favour of four of the children, for a sum of £400 each, subject to the mother's life estate, and there was evidence (though the deed was not forthcoming) that an appointment of a sum of £200 had been made in favour of *J.*, another child, who predeceased the testatrix. There were eleven children of the marriage, one of whom died in infancy. *H.* and *M.* were two children in whose favour appointments had been made. All the persons mentioned in the will were children of the testatrix and objects of the power of appointment. At the time of her death testatrix had little or no property of her own on which the will could operate:—*Held*, that the will operated as an execution of the power of appointment in all its parts. *Peirce* v. *M'Neale* - - - - - - M. R. 118

EXECUTION OF WILL—*Unattested codicil—Subsequent codicil not referring to prior codicil.*] A testator drew a will in his own handwriting. He signed it, and then added something to it, in which he referred to what was written above as his "last will." He subscribed the addition by again writing his name. He then summoned two witnesses into the room, who saw the paper there, signed with the two signatures. The testator acknowledged his signature in their presence. According to the evidence, in doing so, he pointed to the upper signature, and directed the witnesses to sign their names in the space opposite the first signature. Testator subsequently executed a codicil (duly attested) in these terms—"By this codicil to my last will and testament I leave and bequeath to my nephew *F. C.* . . . the sum of £7 sterling":—*Held*, that the first and third parts of the document (excluding the second) constituted the last will of the testator. *Woodroofe* v. *Creed* [PROB. 508

EXECUTOR—*Refusal to take out probate—Intermeddling with assets of deceased—Acts referable to office of executor.*] *K.*, who was priest of the parish where a deceased testatrix lived, and another clergyman, were appointed executors. *K.* attended the deceased, as her clergyman, on her death-bed, and at the time, or shortly afterwards, was handed (as he stated, for safe-keeping) by *W.*, a sister of deceased, a bank deposit receipt for a sum of money in the joint names of herself and the deceased. According to the evidence he did not before this know of his appointment as executor. He was also given by *W.* certain sums of money, assets of the deceased. He deducted therefrom a sum of money to pay for the funeral office celebrated by him, and in respect of a legacy or gift

EXECUTOR—*continued.*
for masses, &c., contained in the will, which he stated *W.* directed him to keep for these purposes. After these deductions the assets received by *K.* were returned to *W.*, and were by her distributed to the legatees in a meeting held for that purpose in the vestry of the chapel of which *K.* was the parish priest. *K.* and the other clergyman named as executors were present at the distribution of the assets in the vestry. K. refused to take out probate of the will of the deceased:—*Held*, that *K.* had interfered with the assets of the testatrix in such a way that he could not repudiate the office of executor, and that he was bound to extract probate of the will. *In the Goods of Hanlon* PROB. 551

—— Probate duty — Insufficient amount paid — Estate fully administered - 252
See PROBATE DUTY.

EXTRACTS — Deeds — Briefing — Taxation of costs - - - - - - 378
See TAXATION OF COSTS. 1.

EXTRINSIC EVIDENCE—Will—Execution of power - - - - - 118
See EXECUTION OF POWER.

FAIR RENT—*Land Law* (*Ireland*) *Acts*, 1881 (*sect.* 8, *sub-sect.* 6), *and* 1887 (*sect.* 1)—*Lease for lives in being—Agreement under Act of* 1881, *fixing fair rent—Devolution of tenant's interest.*] *W. G.* held a farm of land as lessee under a lease, dated 1st May, 1824, by which the lands were demised to *P. F.*, to hold unto *P. F.*, his heirs, executors, administrators, and permitted assigns, for the lives therein named. One of the *cestui qui vie* survived *W. G.* On the 13th February, 1890, an agreement and declaration fixing a fair rent, pursuant to sect. 8, sub-sect. 6, of the Land Law (Ireland) Act, 1881, was entered into between the landlord and *W. G.*, and duly filed in the Court of the Irish Land Commission. *W. G.*, on the 26th November, 1890, mortgaged the said farm, and died on the 15th September, 1891. The farm was sold after his death, under the power of sale in the mortgage, and there remained, after payment of principal and interest due on foot of the mortgage, and arrears of rent, a sum of £500:—*Held*, that the agreement under the Act of 1881 could only have been entered into on the basis of a surrender of the lease, and the creation of a tenancy from year to year, at the rent agreed upon, and that the sum of £500, which represented the tenant's interest in the farm, descended as personal estate. *In re Gray; Gray* v. *Gray* - - - V.-C. 65

—— Sale of tenancy by mortgagee—Land Law (Ireland) Act, 1881, s. 1 - - 179
See MORTGAGE.

FORECLOSURE—Right of—Judgment creditor—Pigot's Act - - - - 158
See JUDGMENT.

FOREIGN COURT—Restraining proceedings in—Winding-up - - 321, 329
See WINDING-UP.

GAS ENGINE—Agreement for hire of 235, 240
See HIRING AGREEMENT.

GIFT OVER—Meaning of words "with benefit of survivorship"—Will—Construction
See SURVIVOR. 2. [209

GIFT TO A CLASS—*Will—Construction—Power of appointment by trustees amongst blood relations of testator living at a stated period—Gift in default of appointment to next-of-kin then living, exclusive of a named person—Time for ascertainment of class—Meaning of word "then."*] A testator (pursuant to a power) appointed certain property to his son *W.*, subject to a perpetual annuity thereout to his son *G.*, and directed that the residue of his property should, at the death of his wife, or at the expiration of ten years from his death, whichever should last happen, be held by his trustees on trust as to one moiety for his son *W.* absolutely, if he should be then alive and should not have incumbered the property appointed to him by the testator; but if he should be then dead, or should have incumbered the said property, then in trust for all or any of his relations by blood then living other than his son *W.*, as the then trustees of his will should appoint; and in default of appointment, in trust for the persons who would then be his next-of-kin, according to the statutes of distributions, if his son *W.* were then dead, such persons to take as tenants in common in the shares prescribed by the said statutes. The testator directed that the other moiety should be held on trust for his son *G.* absolutely, with like gifts over, in the event of *G.* being then dead, or having anticipated his annuity, to the testator's blood relations or next-of-kin, to the exclusion of *G.* The testator died in 1872, leaving a widow and his two sons *W.* and *G.* surviving. The widow died in 1873. *G.* anticipated his annuity, and died in 1876, leaving one child. *W.* incumbered his share, and died in 1879, leaving three children. No appointment was made by the trustees of the will at the expiration of the period of ten years from the testator's death, and new trustees were appointed in 1872, and again in 1891:—*Held* (on an originating summons taken out by the trustees):—1, that the present trustees could not exercise the power of appointment; 2, that the persons to take the property in default of appointment were to be ascertained at the expiration of the ten years from the death of the testator, and that it was divisible between the grandchildren *per stirpes*. *Wharton* v. *Barker* (4 K. & J. 483) and *Re Nott* (37 Ch. Div. 517) followed. *Valentine* v. *Fitzsimons* [M. R. 93

2. —— *Will—Construction—"Then" living—To what period referred—Last antecedent—Ascer-*

GIFT TO A CLASS—*continued.*

tainment of class.] A testator devised certain lands in the following terms:—"To my eldest son John and his assigns during his life, and after his death to such one or more of his children or other issue born in his lifetime, and his, her, and their executors and administrators, at such time and times, in such shares and proportions, and for such estate or estates, and charged with such sum or sums of money for the others or other of them, as my said son shall, by deed or will, appoint; and in default of appointment, I give and bequeath the same to and amongst all his children who shall be living at his decease, or who shall have died leaving issue then living, and their respective administrators and executors, in equal shares, as tenants in common for ever. And in case my said son shall leave no issue living at the time of his decease, then, subject as aforesaid, I give, devise, and bequeath the same to my second son Richard, and his assigns during his life"; and then followed the same provisions and limitations in favour of the children or other issue of Richard, born in his lifetime, as those contained in the devise in remainder after the death of the eldest son. In the event of the death of Richard without lawful issue, the lands were devised in similar terms to the testator's third son Emanuel, for his life, with the same provisions and limitations in favour of his children or other issue born in his lifetime; and in the event of the death of Emanuel without issue, the lands were devised in similar terms to the testator's fourth son Robert, for his life, with the same provisions and limitations in favour of his children or other issue born in his lifetime. The will then provided:—"And in case my said son Robert shall leave no issue living at the time of his death, then, subject as aforesaid, I give and bequeath the same to my daughters who shall then be living, or who shall have died leaving issue then living, and their respective executors and administrators, in equal shares, as tenants in common for ever." The four sons of the testator mentioned in the will survived him. Robert, the fourth son, died in 1853, unmarried, and without issue; and the third son, Emanuel, died in the same year, also unmarried and without issue. John, the eldest son, died in 1862, without issue, and having survived his wife. Richard, the surviving son of the testator, died in 1892, unmarried and without issue:—*Held*, that the daughters of the testator who were to take as tenants in common, under the provisions of the will, were to be ascertained as a class on the death of Robert in 1853, and not on the death of Richard in 1892, when all the previous limitations in favour of the sons of the testator were exhausted. *Archer* v. *Jegon* (8 Sim. 446) considered and followed. The general rule of construction in almost all questions arising upon wills is first to ascertain by an examination of the entire will what is the natural and grammatical meaning of the language used by a testator, subject to this, that if the law places a certain signification upon the words he has used, they must, in the absence of a controlling context, be construed in that sense, no matter how he may possibly have meant them to be understood; and having thus arrived at the meaning of the words, they must be so applied, unless so to do would lead to some palpable absurdity, or violate some rule of law. *Palmer* v. *Orpen* - - - M. R. 32

GIFT TO A CLASS—*continued.*

GRAND JURY—County Infirmary—Surgeon's salary—Private endowment - 26
See COUNTY INFIRMARY.

GRAND JURY CESS—*Unoccupied premises—Presentment—Liability of owner in fee—Arrears recoverable—"Charge" upon lands—Action at law—Person previously liable*—6 *&* 7 *Wm.* 4, *c.* 116, *s.* 153—19 *&* 20 *Vict. c.* 63, *s.* 7.] The owner in fee of premises which are rateable and rated for county cess is liable for arrears of rates struck whilst he was not in occupation, and whilst the premises were, in fact, unoccupied, he having afterwards gone into occupation, and so continuing at the time when one or more subsequent rates had been struck, and when the arrears were represented. Such liability is not limited to two years' arrears from the original presentment. In such case the owner in fee is primarily liable to pay the arrears, and consequently his liability is not limited to two years from the original presentment. The Court has no power to order a sale of the premises on which the grand jury cess is a "charge," under sect. 153 of 6 & 7 Wm. 4, c. 116, for payment of the arrears thereof. *King* v. *Lord Ardilaun* - M. R. 48

GRAZING RENTS—Sale in Land Judge's Court—Rights of purchaser 261, 266
See SALE, LAND JUDGE.

HEIR—*Practice—Probate Division—Heir-at-law made a party—R. S. C. Ir.*, 1891, *Order XVI., Rule* 10.] Where an executor is proceeding to prove a will affecting real estate in solemn form, the Court has power, under Order XVI., Rule 10, to authorize the executor to make the heir-at-law a defendant in the intended action. *In the Goods of Tallon* - - - - - PROB. 57

HIRING AGREEMENT—*Construction—Property in goods—Option to purchase—Bankruptcy—Trade custom—Reputed ownership.*] A gas engine was in possession of a manufacturing cooper, under an agreement which, after describing the parties as "the owners and lessors" and the "lessee," respectively, provided that the lessee should pay to the owners and lessors, as rent, £60 cash before delivery, and the balance between that sum and £240 by eight equal quarterly payments, and that upon payment of the said several sums the agree-

HIRING AGREEMENT—*continued.*
ment should be at an end, and the gas-engine should become the property of the lessee as purchaser thereof; but that until the said sums should have been fully paid, with insurance, repairs (if any), and other costs and expenses, legal or otherwise, connected therewith, the engine should remain the property of the owners and lessors; and declared that the engine was only let on hire to the lessee until all sums due under the agreement were paid; and it was further provided that in case of failure in payment of any of the abovementioned sums, or in case the lessee, during the continuance of the agreement should, *inter alia*, be adjudged a bankrupt, and on the breach of any of the covenants and conditions therein contained, the full balance of £240 should, at the election of the owners and lessors, at once become payable and be recoverable by them; but that instead of seeking to recover such balance they might, if they thought fit, seize and resume absolute possession of the engine, and sell the same, and the several sums which should have been paid by the lessee should be forfeited to the owners or lessors, who out of the purchase-money to arise on any sale, should have power to re-imburse themselves all costs and expenses, and after retaining the difference between the instalments actually paid and the said sum of £240 pay the surplus (if any) to the lessee: provided also that in case the owners and lessors should see fit to resume possession of the engine without proceeding to a sale the loss occasioned to them by the non-performance of the provisions of the agreement on the part of the lessee should be borne by the lessee; and in case of bankruptcy the owners and lessors should be entitled to prove against his estate for the same as and for liquidated damages. A plate with the lessors' name was affixed to the engine, but, in the position which the engine occupied in the bankrupt's premises, this plate could not be seen. Only one instalment was paid by the lessee, and after several others became due he was adjudicated a bankrupt, the engine being in his possession at the time of such adjudication. On motion by the lessors to have the engine delivered up to them, waiving any right of proof, the Court being satisfied upon the evidence that there was a notorious custom of hiring such engines to persons in the trade of the bankrupt:—*Held*, by the Court of Appeal (Walker, C., and Fitz Gibbon and Barry, L.JJ.), reversing the decision of Boyd, J., on the construction of the agreement, that the property in the engine had not passed to the bankrupt. In construing such agreements, and applying to them the notoriety of trade custom in excluding reputation of ownership, there is no distinction between agreements for the hire of articles of luxury and articles of commerce. *Ex parte Fallester and Son: In re Dunne* (25 Ir. L. T. R. 85), approved of and followed. *In re Peel: Ex parte Crossley* - BANKCY. 235; APP. 240

HIRING AGREEMENT—*continued.*
HOTCHPOT CLAUSE — Will — Portions—Ademption - - - - - 267
See ADEMPTION.

HUSBAND AND WIFE—*Marriage settlement—Interest by entireties.*] By marriage settlement, made in 1868, mortgages were assigned to the trustees, upon trust to pay, during the joint lives of the husband and wife, the interest, dividends, and annual produce of the trust funds, upon the joint order or receipt of husband and wife, and after the death of either, to pay the same to the survivor for life. The settlement contained a covenant by the husband that the money due on the mortgages was well secured, and that he would make good any deficiency:—*Held*, that, as between husband and wife, this trust created an interest by entireties, and that they were entitled to an interest *per tout* only; and that arrears of interest accrued in the life of the husband belonged to his estate, and could not be considered as choses in action of the wife not reduced into possession by the husband. *In re Tyrell, Chamier* v. *Tyrell* - V.-C. 267

—— Distributive share of widow—Whether barred by settlement - - - 138
See DISTRIBUTIONS, STATUTE OF.

INCOME—Gift of, indefinitely—Will—Construction - - - - - - 209
See SURVIVOR. 2.

INCUMBRANCE—Trust for payment of accumulations—Right of incumbrancer to a sale - - - - - - 355
See ACCUMULATION.

INDEMNITY—Third party—Form of order 153
See THIRD PARTY.

INFIRMARY—County—Surgeon's salary 26
See COUNTY INFIRMARY.

INJUNCTION—Winding-up—Restraining proceedings in foreign Court 321, 329
See WINDING-UP.

INSTRUCTIONS—Administration and trading accounts—Costs - - - 544
See COSTS. 1.

INTEREST ON MONEY—Legacy—Gift of interest for maintenance - - 69
See VESTED GIFT.

INTERMEDDLING — Executor — Refusal to take out probate - - - 551
See EXECUTOR.

INTESTACY—Widow's share whether barred by settlement - - - 138
See DISTRIBUTIONS, STATUTE OF

JOINT RECEIPT—Husband and wife—Trust—Entireties - - - - 267
See HUSBAND AND WIFE.

JUDGMENT — *Effect of under Pigot's Act — Charge on land — Right to foreclosure — Equitable mortgage — Statute of Limitations — Trustee in possession.*] *W. H. M.* being entitled to three houses in the county of Dublin, held under a lease for lives renewable for ever, by a settlement dated the 28th June, 1837, executed on his marriage with *E. K.*, conveyed the premises to *F. W. M.* and *F. B. K.*, upon trust, for *W. H. M.* for life, or until bankruptcy or failure of credit, with remainder to *E. K.* for life; and after the death of the survivor upon trust in default of issue (which event happened) to reconvey the premises to *W. H. M.*, his heirs and assigns. *W. H. M.*, on the 31st May, 1831, gave a bond to *F. W. M.* for the sum of £1000, conditioned for payment of £500, with interest at 5 per cent., on which judgment was entered in Trinity Term, 1841, and by an award of the 11th December, 1841, made on a submission to arbitration between *F. W. M.* and *W. H. M.*, it was declared that the judgment should stand as security for £279 15*s*. By an order of the Lord Chancellor, dated the 22nd February, 1842, in a cause petition of *M.* v. *M.* it was ordered that *W. H. M.* should pay to *F. W. M.* the sum of £600, with interest at 6 per cent., and this order was duly registered as a judgment under 3 & 4 Vict. c. 105, s. 28. By a settlement of 30th July, 1851, and an indenture of even date, made on the marriage of *F. W. M.* with *G. K.*, these judgments and the sums secured by them were assigned to *L. B.* and *R. H. C.* upon trust to raise the amounts and stand possessed thereof in trust for *F. W. M.* for life, and after his decease in trust for his wife for life, and, subject thereto, in trust for the children of the marriage. *W. H. M.* became embarrassed shortly after his marriage, and his wife entered into possession of the income of the trust property. *W. H. M.* died on the 6th September, 1861; and Mrs. *M.* survived until the 29th September, 1877. From 1874 the defendant *F. W. M.* was in actual receipt of the rents for her, and after her death, thinking that he was *bona fide* entitled to the property as heir-at-law of *W. H. M.*, he retained the rents himself. In 1891, the defendant *F. W. M.* discovered that he was not entitled to the property, and that the title was in the plaintiffs; but he claimed the right to retain the rents for the purpose of satisfying the sums due under the judgments, and 50 years' interest as a credit against the rents: — *Held*, (reversing the decision of the Master of the Rolls), that there was no right in *F. W. M.*, under the judgments, to recover the lands in a foreclosure action; that any claim which *F. W. M.* had under the judgments was barred by the Statute of Limitations, and that the plaintiffs could compel a re-conveyance without paying off the amount due on the judgments. *Shea* v. *Moore* APP. 158

JUDGMENT *continued.*

—— For costs — Solicitor's lien not waived 225
See SOLICITOR'S LIEN. 2.

In rem - Decree in administration action — Collateral issue - - 274, 298
See ESTOPPEL.

JUDGMENT MORTGAGE — *Registration — Affidavit — Description of lands.*] An affidavit to register a judgment as a mortgage stated that the judgment debtor was seized, &c., of the lands of "*L.*" in the barony of *B.* and the county of *G.* There were, in fact, two townlands in the barony of *B.* called "*L.*" East and "*L.*" West, in the latter of which the judgment debtor's property was situated; but there was no townland called or known as "*L.*", nor was there any evidence to show that there was any denomination of land known as "*L.*" simply:—*Held*, that the registration was defective. *In re O'Connor's Estate; M'Namara, Petitioner* - - - - MONROE, J., 408

JURISDICTION—Court of Bankruptcy—Protection order—Declaration that petitioner should not part with his estate - 335
See ARRANGING DEBTOR.

—— Service of writ out of 185, 310, 385, 401
See DOMICIL.
SERVICE OUT OF THE JURISDICTION. 1, 2.

KNOWLEDGE AND APPROVAL OF CONTENTS OF WILL—*Presumption—Omission of clause by mistake.*] A testator made a will in 1887, containing a clause by which he directed that in the event of his son *W. B.* dying unmarried and having no male heir to possess and inherit the estate, it was to go to *A. M. B.*, the eldest son of his son *R. B.* In October, 1891, the testator made another will, which was copied by his daughter, under his directions, from the will of 1887, with certain alterations. It did not contain the clause above mentioned. In November, 1891, the testator, being dissatisfied with the will of October, 1891, requested a relation to draw up a new will, which he accordingly did, and left it with the testator for his approval. The testator shortly afterwards executed it. This will did not contain the clause above mentioned, but provided that in the event of his son *W. B.* marrying without the consent of his executors the estate was to go to his son *R. B.* for life, and after his death to *A. M. B.*, son of *R. B.* Both the wills of October and November, 1891, contained the usual revocatory clause. *A. M. B.* alleged that the clause above mentioned had been omitted from the wills of 1891 by mistake, and brought an action against the executors and *W. B.* to have the three wills admitted to probate, with a declaration that the clause above mentioned had not been revoked, or in the alternative to have the three wills admitted to probate, with the revocatory clauses omitted. One of the executors and

KNOWLEDGE AND APPROVAL OF CONTENTS OF WILL—*continued.*

W. B. propounded the will of November, 1891. Parol evidence was given as to the circumstances under which the wills were prepared and executed. The Court was of opinion that there was no sufficient proof that the clause in question had been omitted by mistake, and further, that even if the clause had been omitted by mistake it could not make the decree asked for by the plaintiff. The Court also held that, under the circumstances, the testator must be taken to have known and approved of the contents of the will of November, 1891, and directed it to be admitted to probate. The law as to when knowledge and approval of a will is to be presumed considered. *Beamish* v. *Beamish* [Prob. 7

LAND LAW IRELAND ACTS—Agreement fixing fair rent—Lease for lives—Devolution of tenant's interest - - 65
See Fair Rent.

—— Sale of judicial tenancy by mortgagee—Pre-emption - - - - - - 179
See Mortgage.

LANDS CLAUSES ACT—S. 80—Costs—Grant of administration - - - 146
See Compulsory Purchase. 1.

—— Title by possession—Payment out of Court
See Compulsory Purchase. 2. [156

LEASE—Building—Preparation of—Scale of charges - - - - - - 503
See Taxation of Costs. 3.

—— For lives—Fair rent fixed by agreement—Devolution of tenant's interest - 65
See Fair Rent.

LEGACY—Gift of interest for maintenance—Severance from general personal estate
See Vested Gift. [69

LEGITIMACY—Collateral issue in administration action—Decree - - 274, 298
See Estoppel.

LIEN—Solicitor's.
See Solicitor's Lien.

LIMITATIONS, STATUTE OF—*Fund in Court—Annuity—Absolute order for sale.*] After the sale by the Court of lands, upon which an annuity was charged, part of the purchase-money was retained, and the dividends thereof were applied in part payment of the annuity, which they were insufficient to discharge in full:—*Held*, that the annuitant was entitled at any time to resort to the *corpus* to pay the portion of the annuity remaining unpaid, and that the Statute of Limitations did not apply. *In re Belton's Estate* Monroe, J. 537

—— Judgment—Charge on land under Pigot's Act - - - - - - 158
See Judgment.

MAINTENANCE—Gift of interest for—Legacy—Vesting - - - - - 69
See Vested Gift.

MERGER—Of charge on lands by will—Probate duty - - - - - - 252
See Probate Duty.

MISTAKE—Omission of clause in will 7
See Knowledge and Approval of Contents of Will.

MORTGAGE—*Specific performance—Sale under power in mortgage—Land Law (Ireland) Act*, 1881, *s.* 1—*Right of pre-emption.*] The defendant, by an agreement dated the 7th February, 1893, contracted to sell to the plaintiff a farm of land, held under contract of tenancy from year to year, at a judicial rent, of which he was mortgagee. The defendant failed to carry out the sale, and relied on the bankruptcy of the mortgagor and on the non-service on the landlord of notice under the Land Law (Ireland) Act, 1881, section 1, as a defence to the action for specific performance:—*Held*, that the mortgage was not a sale within section 1 of the Land Law (Ireland) Act, and that the landlord had not a right of pre-emption. Specific performance of the contract for sale decreed. *Fisher* v. *Coan* [V.-C. 179

—— Equitable
See Equitable Mortgage.

—— Judgment
See Judgment Mortgage.

—— Registration of deed—Affidavit verifying execution by mortgagee only - - 488
See Registration of Deed.

—— Sale in administration action—Deficiency—Costs - - - - - 316, 319
See Costs. 2.

—— Solicitor's lien—Priority - - 511
See Solicitor's Lien. 1.

NEXT-OF-KIN—"Then" living—Gift in default of exercise of power—Time for ascertainment of class—Will—Construction 93
See Gift to a Class. 1.

NOVELTY—Invention - - - 417
See Patent.

OFFICE UNDER THE CROWN—Trustee procuring his own appointment 74
See Trustee.

ORDER AND DISPOSITION—Bankruptcy—Hiring agreement - - 235, 241
See Hiring Agreement.

ORDERS GENERAL—1878, April, VII., Sch., items 75, 95, 105, 106 - - 378
See Taxation of Costs. 1.

—— 1882, June, Rule 2, Sch., item 15 - 378
See Taxation of Costs. 1.

—— 1884, April 16 (Solicitors' Remuneration)
See Taxation of Costs. 3. [503

ORDERS, GENERAL—*continued.*
—— 1891, Jan. 18, XI., - 185, 385, 410
See DOMICIL.
SERVICE OUT OF THE JURISDICTION. 2.
—— —— XVI., R. 10 - - - - - 57
See HEIR.
—— 1893 (COSTS), - - - - - 544
See COSTS. 1.
PARTIES—Probate suit—Heir at law 57
See HEIR.

PATENT—*Validity—Novelty—Utility—Application of a known appliance to an analogous use—Application of an old contrivance to a new purpose—Ingenuity—Anticipation—Provisional and complete specifications—Variance—Evidence.*] The plaintiff had patented an improvement in "wet spinning for flax and like yarns," which consisted in the use, as a pirn, of a thin flexible paper tube placed upon a hard core or base, upon which, in the process of spinning, the yarn was wound. This tube, with its base, formed a composite pirn or carrier, which, with the yarn wound upon it, was removed from the spinning frame, and taken to the drying-room. The result of the process of drying, necessary in wet spinning, was to detach the inner core from the paper tube while the yarn retained its contact with and adhered to the paper tube, and remained "in cop" as spun on the tube. The inner core was then taken out of the tube and returned for further use to the spinning frame, while the cop, *i.e.* the tube with the yarn as spun on it was sent to the weaver ready for use in the shuttle. In wet spinning the unspun fibre is passed through a trough of warm water, in which it is saturated before reaching the rollers. The object of this treatment is by maceration to prepare the fibre for the process of drawing by the rollers, and also to remove as much as possible of the natural gum. After passing through the rollers the fibre is spun on the pirn or bobbin in a saturated condition, and is in this condition removed to a drying-room, where it is artificially dried. Flax yarns, and yarns of similar fibres have qualities that require, for the purposes of spinning, the treatment of saturation by water and maceration, which forms part of the process of wet spinning. The effect of saturation, followed by drying, combined with the inelastic character of the yarns which require to be wet spun, creates a difficulty peculiar to wet spinning. This difficulty consists in the yarn, when dry, becoming slack on the base or carrier upon which it has been spun, and, after the yarn has been dried, necessitates either re-winding or some process for tightening the yarn upon its base or carrier, or some other contrivance for retaining the yarn thereon. Previously to the plaintiff's patent, pirns or carriers of various materials and construction had been designed, and various processes adopted, for the purpose of meeting this

PATENT—*continued.*
difficulty in wet spinning, and producing the cop or spun yarn in condition ready for use by the weaver on the base or carrier upon which it had been spun; but prior to the plaintiff's patent no one had ever used thin paper tubes in wet spinning, or for the purpose of obviating the above difficulty. The plaintiff's patent was designed to meet this difficulty, and was more successful than any previous contrivance or process in efficiently and cheaply obviating this difficulty, and in producing the cop of yarn in a condition ready for use by the weaver upon the pirn or carrier on which it had been spun. The above difficulty did not occur in dry spinning. Cotton worsted and yarns of like fibre require dry spinning. The only process to which these yarns, or the threads formed from them, are subjected, in which water is used is that known as "doubling." This process consists in winding together two or more threads already spun, and the threads are only damped to remove roughness and prevent kinking, and are never wet to a degree which requires artificial drying, and no shrinkage or expansion of the yarn upon its carrier takes place. For many years previously to the plaintiff's patent thin paper tubes of various sizes had been used in the spinning and doubling of cotton, worsted, and yarns of similar fibre, and sometimes in combination with a rigid core or base, separable from the spindle. The object of this use of such tubes was simply to provide a cheap base for the winding of the fibre or to keep open the hole in the centre of the cop, or to facilitate the "doffing" or removal of the cop from the spinning frame. The use of such tubes had been the subject of several patents anterior to that of the plaintiff, relating to spinning and doubling, and in some of these patents the paper tube was used in combination with a rigid base separable from the spindle. But all these patents were, by the terms of their specifications, or by the method thereby prescribed of using the paper tube, expressly or by implication, confined to dry spinning and doubling, and none of them disclosed how these thin paper tubes could be used in wet spinning or was directed to the peculiar difficulty occurring in wet spinning; and as compared with each of these previous patents the plaintiff's method of using the paper tube was distinct in purpose and not analogous in mode. In all processes and patents previous to the plaintiff's patent, where a rigid base separable from the spinning frame was used in connexion with these paper tubes, such base either formed portion of, or was an adjunct of, the spindle, and the plaintiff was the first person who used such a base as part of a composite pirn or carrier, and was the first person who used the process of drying as an agency to separate the inner core of this composite pirn from the outer tube. Since the plaintiff's

PATENT—*continued.*
patent the use of thin paper tubes by his process had become general and increasing in the wet spinning of flax and like fibres, and in the trade of wet spinning these tubes were driving out of the market the other pirns or carriers. Under his patent the plaintiff had granted licenses for the use in wet spinning of thin paper tubes according to his process, and was in receipt, by way of royalty under these licenses, of payments of large amount:—*Held* (affirming the Vice-Chancellor), that the plaintiff's process was novel, useful, and involved a sufficient exercise of ingenuity to make it a good subject-matter for a patent, and that the plaintiff's patent was valid and had not been anticipated, and that none of the previous patents or processes in which thin paper tubes were used disclosed the practicability or method of using such tubes in wet spinning, or the practicability or method of so using them for the purpose of obviating the difficulty peculiar to wet spinning; and that none of these patents or processes was directed to meet the same difficulty, or followed the same method, or obtained the same advantages, as the plaintiff's patent. At the trial of the action before the Vice-Chancellor, *L.*, who was one of the witnesses for the defence, was asked in direct examination—"Did you make a suggestion to any other person at the same time about the introduction of the paper tubes?" *E.*, who was also a witness for the defence, was asked in direct examination—"Prior to September, 1889, had you a conversation with *L.* in reference to the use of these paper tubes?" Both questions were objected to, and disallowed as irrelevant. No effort was made either to press them at the time or to lay any foundation for repeating them, nor was any undertaking offered to make them evidence in due course. The defendants appealed from the judgment of the Vice-Chancellor. No reference was made to the rejection of the proferred evidence in the notice of appeal, but at the hearing of the appeal the appellants argued that the evidence was improperly rejected:—*Held*, that the appellants, having to all appearance at the time submitted to the ruling of the Vice-Chancellor, could not, in the Court of Appeal, be permitted to argue on statements of what they could have proved, but did not offer to prove, that the questions, which were *prima facie* irrelevant, should have been admitted. *Pirrie* v. *York-street Spinning Co.* - - - - - - - - App. 417

PAYMENT INTO COURT—Certified balance—Failure to comply with order—Fiduciary relation - - - - - 63
See Attachment.

PAYMENT OUT OF COURT—Compulsory purchase—Costs of obtaining administration—Lands Clauses Act, s. 80 146
See Compulsory Purchase. 1.

PAYMENT OUT OF COURT—*continued.*
—— Lands Clauses Act—Title by possession 156
See Compulsory Purchase. 2.

PLEADING—Wilful default - - 74
See Trustee.

POOR-LAW—Guardians—Solicitor—Attendance in Dublin—Costs—Taxation - 135
See Taxation of Costs. 2.

PORTIONS — Ademption — Will — Hotchpot clause - - - - - - 267
See Ademption.

POWER—Execution of - - - 118
See Execution of Power.

—— Of sale—Mortgage—Land Law Ireland Act, 1881, s. 1—Right of pre-emption 179
See Mortgage.

—— Of trustees to appoint—Not exerciseable by newly appointed trustees - - 93
See Gift to a Class. 1.

—— Of trustees to arrange for the settlement of children—Extent of—Control of Court—Will—Construction - - - 74
See Trustee.

PRACTICE, BANKRUPTCY—Certificate of conformity—Failure to pay 10*s.* in the £
See Bankruptcy. [517

—— Depositions—Admissibility against third party
See Depositions. [183

PRACTICE, CHANCERY DIVISION—Attachment—Fiduciary relations—Nonpayment of certified balance - - 63
See Attachment.

—— Costs—Administration action—Accounts—Instructions for - - - 544
See Costs. 1.

—— Costs—Administration action—Sale of mortgaged property—Deficiency 316, 319
See Costs. 2.

—— Costs—Taxation
See Taxation of Costs.

—— Land Judge—Sale—Grazing rents, 261, 266
See Sale, Land Judge.

—— Lands Clauses Act—Costs of obtaining administration to make title - 146
See Compulsory Purchase. 1.

—— Lands Clauses Act—Payment out of Court—Title by possession - - - 156
See Compulsory Purchase. 2.

—— Rejection of evidence—Appeal - 417
See Patent.

—— Sale—Tithe rentcharge—Rental and conditions—Compensation - - 1
See Compensation.

—— Service of writ out of the jurisdiction
See Domicil. [185, 385, 401
Service out of the Jurisdiction. 2.

—— Third party—Costs—Form of order 153
See Third Party.

PRACTICE, CHANCERY DIVISION—*continued.*

—— Winding-up—Restraining proceedings in foreign Court - - - 321, 329
See WINDING-UP.

PRACTICE, COUNTY COURT—Appeal—Objections not raised by cross appeal 412
See APPEAL.

PRACTICE, PROBATE AND MATRIMONIAL DIVISION—Executor intermeddling with assets—Refusal to take out probate - - - - - 551
See EXECUTOR.

—— Parties—Heir-at-law—Order XVI., R. 10
See HEIR. [57

—— Subpœna to lodge testamentary paper—Service out of the jurisdiction - 310
See SERVICE OUT OF THE JURISDICTION. 1.

PRE-EMPTION—Sale by mortgagee of judicial tenancy—Land Law Ireland Act, 1881, s. 1 - - - - - - 179
See MORTGAGE.

PRESUMPTION—Knowledge and approval of contents of will - - - 7
See KNOWLEDGE AND APPROVAL OF CONTENTS OF WILL.

PRINCIPAL AND SURETY
See SURETY.

PRIORITY—Mortgage—Solicitor's lien—39 & 40 Vict. c. 44, s. 3 - - - 511
See SOLICITOR'S LIEN. 1.

PROBATE—Omission of clause in will by mistake - - - - - - 7
See KNOWLEDGE AND APPROVAL OF CONTENTS OF WILL.

—— Refusal to extract—Executor intermeddling with assets - - - - 551
See EXECUTOR.

PROBATE DUTY—*Insufficient amount paid—Estate fully administered—Claim by Commissioners of Inland Revenue for additional duty—Customs and Inland Revenue Act*, 1881 (44 & 45 *Vict. c.* 12)—*Merger of charge by will.*] An executor, by mistake, paid an insufficient amount of probate duty, fully administered his testator's estate, and died:—*Held*, applying *Attorney-General* v. *Smith* ([1892] 2 Q. B. 289; [1893] 1 Q. B. 239), that the Inland Revenue had no remedy for additional duty under the Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12). A testator, by his will, directed that certain charges vested in him should merge in his real estate:—*Held*, that probate duty was payable on the charges. *In re Nunn's Estate; Nunn, Petitioner* - - MONROE, J. 252

PROTECTION ORDER—Arranging debtor—Declaration that petitioner should not part with his estate - - 335
See ARRANGING DEBTOR.

RECITAL IN DEED—Estoppel - 66
See SURETY.

REGISTRATION OF DEED—*Affidavit of execution by mortgagee only*—6 *Anne, c.* 2.] *Held*, following *Jack* d. *Rennick* v. *Armstrong* (1 H. & B. 727) and *In re Stephens' Estate* (Ir. R. 10 Eq. 282), that registration of a mortgage upon an affidavit verifying the execution of the instrument by the mortgagee only is defective. *In re Hurley's Estate. In re Biddulph's Estate; Provincial Bank of Ireland (Limited) Petitioners* - - MONROE, J. 488

REGISTRATION OF JUDGMENT MORTGAGE—Affidavit—Description of lands
See JUDGMENT MORTGAGE. [408

REGISTRATION OF TITLE—*Premises impressed with trust for parochial purposes—Trustees appointed by the Court—Local Registration of Title (Ireland) Act*, 1891—*Right to register as owner.*] Premises which had been occupied by successive parish priests were purchased under the Purchase of Land (Ireland) Act, 1885, by the then parish priest. After his death the premises were declared, by a judgment of the Master of the Rolls, to be impressed with a trust for parochial purposes, and trustees, one of whom was the Roman Catholic bishop of the diocese, were, by order of the Court, appointed, in whom the premises were vested:—*Held*, that the trustees (though not trustees for sale) should, under the special circumstances of the case, be registered as owners, under the Local Registration of Title (Ireland) Act, 1891. *In re O' Doherty* [MONROE, J. 58

RENTCHARGE
See ANNUITY.

REVENUE—Probate duty - - - 252
See PROBATE DUTY.

SALE OF GOODS—Agreement whether for sale or hire—Option of purchase 235, 240
See HIRING AGREEMENT.

SALE OF LAND—In Land Judge's Court.
See SALE, LAND JUDGE.

—— Practice, Chancery Division—Mortgaged property—Administration action—Costs
See COSTS. 2. [316, 318

—— Practice, Chancery Division—Rental and conditions—Tithe rentcharge—Compensation - - - - - - 1
See COMPENSATION.

SALE, LAND JUDGE—*Practice—Purchaser—Grazing rents.*] Where lands, which were sold on the 28th October, were subject to agistment contracts, terminating on the 1st November:—*Held*, that the purchaser was not entitled to the half-year's grazing rents, payable on the expiration of the contracts. *In re Kinahan's Estate; Standard Life Assurance Co., Petitioners* [MONROE, J. 261; APP. 266

SALE, LAND JUDGE—*continued.*
—— Annuity—Fund in Court—Statute of Limitations - - - - - - 537
See LIMITATIONS, STATUTE OF.
—— Right of incumbrancer to sale—Trust to pay incumbrances out of accumulations of rent - - - - - - 355
See ACCUMULATION.

SERVICE OUT OF THE JURISDICTION—*Subpœna to lodge a testamentary paper*—20 & 21 *Vict. c.* 79, *s.* 31.] The Probate Division has no jurisdiction in matters where an action or suit is not pending to order service out of the jurisdiction of a subpœna on a person resident in England, to bring into a Probate Registry a testamentary paper. *In the Goods of Ambrose* - - PROB. 310

2. —— *Writ of summons—Gen. Ord. XI., R. S. C.* (*Ireland*), 1891—*Jurisdiction.*] The defendants had their offices in London, and the writ in the action claimed:—1. A declaration that the defendants were trustees of certain lands in the county of Londonderry for the general objects of the Plantation of Ulster, and that a scheme should be settled for the application of the rents; 2. A declaration that the defendant Companies, in so far as they had sold portion of the estates conveyed to them by the Irish Society, had committed a breach of trust by such sale; and 3. An inquiry as to how the defendants had disposed of the woods of *G.* and *K.*:—*Held* (affirming the decision of Porter, M.R.), that the case came within sub-section *b* of Gen. Ord. XI. of R. S. C. (Ireland), 1891, and that service of the writ out of the jurisdiction should be allowed. *Held*, by Fitz Gibbon, L.J., that the case also came within sub-section *d*. *The Attorney-General* (*Johnston*) v. *The Drapers' Co. and Others* [APP. 185
—— Writ of Summons—Gen. Order XI., R. S. C. (Ireland), 1891—Residence—Domicil
See DOMICIL. [385, 401

SETTLEMENT—Construction—Provision "in lieu of dower and thirds at common law or otherwise" - - - - 138
See DISTRIBUTIONS, STATUTE OF.
—— Construction—Trust for husband and wife—Entireties - - - - - 267
See HUSBAND AND WIFE.

SOLICITOR—*Costs—One of several trustees acting as solicitor in relation to trust estate.*] A mortgage was vested in two trustees of a settlement, upon the trusts thereof. One of the trustees, who was a solicitor, acted professionally in the matter of a petition on behalf of his co-trustee and himself for sale of the mortgaged premises:—*Held*, that the rule in *Cradock* v. *Piper* (1 Mac N. & G. 664) applied, and that the trustee solicitor's costs of the proceedings were entitled to rank on the final schedule of incumbrances in priority to the mortgage. *In re Smith's Estate; Hinds and another, Petitioners* - - MONROE, J. 60

SOLICITOR—*continued.*
—— Attendance in Dublin—Costs—Taxation
See TAXATION OF COSTS. 2. [135
—— Instructions for accounts—Costs—Principles in estimating - - - - 544
See COSTS. 1.
—— Lien
See SOLICITOR'S LIEN.

SOLICITOR'S LIEN—*Charging order—Mortgage—Deposit of title-deed—Priorities—Pending suit—Legal Practitioners* (*Ireland*) *Act*, 1876 (39 & 40 *Vict. c.* 44), *s.* 3.] In April, 1890, a farm of land, held by the defendant, under a lease, was put up for sale by public auction, and the plaintiff was declared the purchaser. The plaintiff commenced an action for specific performance of the agreement for sale, and a decree was made, dated 30th January, 1891, directing the defendant to convey. The decree was never acted on, and the suit was not brought to a conclusion. The solicitors representing the plaintiff in the action for specific performance were not paid their costs. On the 29th July, 1892, the plaintiff deposited with *S.* the lease of the farm of land, as security for money which he owed to *S.* and to prevent *S.* from proceeding with an action against him. Subsequently a correspondence took place between plaintiff's solicitors and the solicitors of *S.* No mention was made in the correspondence by the plaintiff's solicitors of the costs due to them or of a claim to lien, but it conveyed the fact that they were the solicitors in proceedings through which the lands had been recovered, and that these proceedings had not been brought to a conclusion. On the 25th November, 1892, the plaintiff was adjudicated a bankrupt, and by a statement of affairs prepared, with the sanction of the plaintiff's solicitors, dated the 26th November, 1892, *S.* was returned as a secured creditor, and the solicitors of the plaintiff among the general unsecured creditors, in respect of their costs. A similar statement of affairs was filed and used in the Bankruptcy Court:—*Held*, that the solicitors of the plaintiff were entitled to a charging order for their costs, when taxed, under 39 & 40 Vict. c. 44, s. 3, on the interest of the plaintiff in the lands, and that this right of lien in respect of costs incurred in a still pending suit ought not to be postponed to the equitable mortgage of *S.*, inasmuch as there had not been any fraud, misrepresentation, or concealment, on their part. *Dennis* v. *Addy* - - - - M. R. 511

2. —— *Retaining lien—Action—Judgment—Waiver.*] A solicitor does not lose his retaining lien by suing his client and obtaining judgment for his costs. *In re Aikin's Assignees' Estate* [MONROE, J. 225

SPECIFICATION—Patent—Sufficiency 417
See PATENT.

SPECIFIC PERFORMANCE—Sale by mortgagee of judicial tenancy—Land Law (Ireland) Act, 1881, s. 1—Right of pre-emption - - - - - - 179
See MORTGAGE.

STATUTE OF DISTRIBUTIONS
See DISTRIBUTIONS, STATUTE OF.

STATUTE OF LIMITATIONS
See LIMITATIONS, STATUTE OF.

STATUTES:—
7 Wm. 3, c. 6 (Ir.)—Distributions - - 138
See DISTRIBUTIONS, STATUTE OF.
6 Anne, c. 2 (Ir.)—Registration of Deeds 488
See REGISTRATION OF DEED.
5 & 6 Geo. 3, c. 20 (Ir.)—Infirmaries and Hospitals, ss. 2, 5, 6 - - - - 26
See COUNTY INFIRMARY.
45 Geo. 3, c. 111.—Hospitals, s. 1 - - 26
See COUNTY INFIRMARY.
3 & 4 Wm. 4, c. 27.—Limitations, ss. 2, 3, 24, 40
See JUDGMENT. [158
6 & 7 Wm. 4, c. 116.—Grand Juries, ss. 85, 86
See COUNTY INFIRMARY. [26
—— —— s. 153 - - - - - 48
See GRAND JURY CESS.
3 & 4 Vict. c. 105.—Judgments, s. 22 - 158
See JUDGMENT.
8 Vict. c. 18.—Lands Clauses Consolidation, s 80
See COMPULSORY PURCHASE. 1. - [146
—— —— - - - - - - - 156
See COMPULSORY PURCHASE. 2.
19 & 20 Vict. c. 63.—Grand Juries, s. 7 48
See GRAND JURY CESS.
19 & 20 Vict. c. 97.—Mercantile Law Amendment, s. 5 - - - - - - 56
See SURETY.
20 & 21 Vict. c. 60.—Bankruptcy and Insolvency, ss. 343, 344 - - - - - 335
See ARRANGING DEBTOR.
20 & 21 Vict. c. 79.—Probate and Letters of Administration, s. 31 - - - - 310
See SERVICE OUT OF THE JURISDICTION. 1.
25 & 26 Vict. c. 89.—Companies, ss. 87, 122, 163
See WINDING-UP. [321, 329
35 & 36 Vict. c. 58.—Bankruptcy, s. 56 - 517
See BANKRUPTCY.
—— —— s. 68 - - - - - - 335
See ARRANGING DEBTOR.
37 & 38 Vict. c. 57.—Limitations - - 158
See JUDGMENT.
39 & 40 Vict. c. 44.—Legal Practitioners, s. 3 511
See SOLICITOR'S LIEN. 1.
44 & 45 Vict. c. 12.—Customs and Inland Revenue
See PROBATE DUTY. [252
44 & 45 Vict. c. 44.—Solicitors' Remuneration 503
See TAXATION OF COSTS. 3.

STATUTES—*continued.*
44 & 45 Vict. c. 49.—Land Law, s. 1 - 179
See MORTGAGE.
—— —— s. 38 sub-sect. 6 - - 65
See FAIR RENT.
50 & 51 Vict. c. 33.—Land Law, s. 1 - 65
See FAIR RENT.
54 & 55 Vict. c. 66.—Local Registration of Title 58
See REGISTRATION OF TITLE.

SUBPŒNA—To lodge testamentary paper—Service out of the jurisdiction - 310
See SERVICE OUT OF THE JURISDICTION. 1.

SURETY—19 & 20 *Vict. c.* 97 (*Mercantile Law Amendment Act*), *sect.* 5—*Deed—Declaration of trust—Recitals—Estoppel.*] Decision of Monroe, J. (31 L. R. Ir. 249), affirmed by Court of Appeal. *In re Davison's Estate* - - - APP. 56

SURGEON—County Infirmary—Salary—Private Endowment - - - 26
See COUNTY INFIRMARY.

SURRENDER—Lease for lives — Agreement fixing fair rent - - - 65
See FAIR RENT.

SURVIVOR – *Will—Construction—Death coupled with contingency—Period of contingency—Survivorship.*] A testator gave the residue of his property to be divided between his four sons in equal shares, with a proviso that the share of any son dying without leaving issue him surviving should be divided between such of his other sons as should be then living, in equal shares, the children of a deceased son to take the share to which their father would have been entitled. All his sons survived the testator, two having issue, and two being unmarried:—*Held*, that the share of each son was defeasible in the event of his dying at any time without leaving issue. *Woodroofe* v. *Woodroofe* [M. R. 299

2. —— *Will—Construction—Gift to children in equal shares—Meaning of words "with benefit of survivorship"—Gift of income of property indefinitely.*] A testator by his will bequeathed to his wife for life so much of the income of railway shares as would amount to £200 per annum, and to his children *A.* and *B.*, during the life of his wife, as much more of the income as would produce £100 per annum; and after the death of his wife bequeathed the said annual sums of £200 and £100 per annum, derivable from the said shares to and amongst his three children *A.*, *B.*, and *C.*, and their executors and administrators, in equal shares, with benefit of survivorship between them. All three children survived the testator, but predeceased the widow. *C.* survived *A.* and *B.*:—*Held*, that *A.*, *B.*, and *C.* took vested interests, liable to be divested, as to each, in the event (which did not happen) of his or her dying before their mother, leaving others or other of them who should survive the mother, and that the capital representing the

SURVIVOR—*continued.*

annual sums of £200 and £100 per annum belonged, in equal shares, to the personal representatives of *A.*, *B.*, and *C. Wiley* v. *Chanteperdrix* M. R. 209

TAXATION OF COSTS—*Party and party—Briefs for trial—Instructions for—Copies of deeds—Extracts—R. S. C. I, April*, 1878, *Ord. VII., Sch., Items* 75, 95, 105, 106—*R. S. C. I., June*, 1882, *Rule* 2, *Sch., Item* 15.] In a taxation, under the Orders and Rules in force previous to the R. S. C. I., July, 1893, of costs between party and party, the Taxing Master disallowed charges for full copies in the briefs for trial of lengthy deeds, and allowed for 30 folios in respect of each deed only, at 4*d.* per folio: His ruling upheld. The discretion of the Taxing Master, as to the amount to be allowed for instructions for briefs for trial not interfered with by the Judge. *Poirez* v. *Collum* [V.C. 378

2. —— *Solicitor and Client—Attendance in Dublin—Board of guardians.*] Upon a summons by a solicitor for an order directing the Taxing Master to review his taxation of a bill of costs as between solicitor and client:—*Held*, that the special fees and expenses of a country solicitor should be allowed in respect of attendances for consultation with counsel, and otherwise for the purpose of conducting proceedings in Dublin, when the solicitor having local knowledge in connexion with the matter had been requested by his clients (a board of guardians) to attend personally in Dublin. *In re Cramsie and Greer* - - M. R. 135

3.—— *Solicitors' Remuneration Act*, 1881; *Gen. Ord.*, 1884—*Building lease—Scale of charges.*] 1. Lease to a Race Committee of 135 acres, with a cottage thereon, for ninety-nine years, at the yearly rent of £237, with a covenant by the lessees to expend upon the premises within twelve months £1000, at least, in good and sufficient improvements of a substantial and permanent character:—*Held*, not to be a building lease within the General Order, 1884, made under the Solicitors' Remuneration Act, 1881. 2. Lease of a large dwelling-house, offices, and garden of about an acre in extent, for ninety-nine years, at the yearly rent of £40, with covenants by the lessee to expend £300, at least, in good and sufficient improvements of a substantial and permanent character, and to keep the demised premises in good and substantial repair, with all buildings or fixtures thereon, and all gates, walls, and improvements then being or thereafter to be executed during the term. The walls of the house were sound, but the roof, floors, and ceilings were in bad condition, and would require, at least, the amount covenanted to be expended, and which the lessee proposed to expend thereon, to put the house in sound and habitable repair:—

TAXATION OF COSTS—*continued.*

Held, that such lease was a building lease within the General Order. 3. In determining whether a lease is or is not a building lease within the General Order, regard must be had to the circumstances of the contract, the subject-matter of the demise, and the nature and extent of the expenditure to be made. *In re Hogan's Estate*

[Monroe, J. 503

—— Compulsory purchase—Lands Clauses Act, s. 80—Costs of obtaining administration to make title - - - - - 146

See Compulsory Purchase. 1.

TENANCY FROM YEAR TO YEAR—Judicial rent—Sale by mortgagee 179

See Mortgage.

THIRD PARTY—*Action by lessee against assignee—Indemnity in respect of previous action by lessor—Costs between solicitor and client—Form of order.*] In an action by a lessee against his assignee to recover sums paid by the lessee for rent, damages, and costs in a previous action, brought against him by the lessor, and his own costs of such previous action, the defendant admitted his liability for the sums paid for rent and damages, but brought in a further assignee as third party, who admitted his liability to indemnify the defendant. The Court decided that the plaintiff was entitled to recover portion of the amount paid by him to the lessor for costs of the previous action, and also the plaintiff's own costs of the same:—*Held*, that the plaintiff was entitled to recover from the defendant his costs of the present action, including orders as to the third party as between solicitor and client; and that the defendant in addition to the amounts paid by him was entitled as against the third party to his costs of action and the third party proceedings, those of the action to be taxed as between solicitor and client, but having regard to the fact that they were payable by the third party. Form of order. *Wiley* v. *Smith* - - - - V.-C. 153

TITHE RENTCHARGE—Sale, Chancery Division—Rental and conditions—Compensation - - - - - - 1

See Compensation.

TRADE—Trustee setting up rival business to that engaged in by testator - 74

See Trustee.

TRUST—Breach of - - - - - 74

See Trustee.

—— Declaration of - - - - - 56

See Surety.

—— For husband and wife—Joint receipt—Entireties - - - - - - 267

See Husband and Wife.

TRUST--*continued.*

—— For parochial purposes—Trustees appointed by Court—Registration of title - 58
See REGISTRATION OF TITLE.

—— For payment of incumbrances out of accumulations of rents—Right of incumbrancers to sell - - - - - - 355
See ACCUMULATION.

TRUSTEE—*Will—Power to trustees to arrange for the settlement of children—In case of disagreement power to umpire to determine amounts—Extent of power of trustees—Control of Court—Testator postmaster—Trustee procuring his own appointment—Personal office under Crown—Wilful default—Trustee setting up rival business.*] A shopkeeper, who was also a local postmaster, by his will bequeathed all his property to his brother and son, to be held by them in trust, and to be managed by them for the benefit of his wife and children, and directed that the brother should have the right of maintenance and a salary for the management of the business, that the trustees should have power to arrange for the settlement of his children as they might determine, and that, in case they disagreed, the parish priest should have full and absolute power to determine both as to the amount payable and times of payment. The testator left a widow and nine children. The trading was continued by the testator's brother, and some years after the testator's death the trustees made a valuation of the property available for distribution, and dividing the sum at which they valued it into ten equal shares, they decided that the sum representing one such share was the amount payable to one of the children. This she declined to accept. In an action brought by her for administration of the estate, and accounts on the basis of wilful default and breach of trust:—*Held*, that the powers given to the parish priest might be resorted to to explain the meaning of the power given to the trustees, and that they must be taken to have powers to determine the amounts and times of payment; but, *held*, that although the rule applicable to such cases of discretionary power is that the exercise of such power will not be interfered with or controlled, if it be regularly and honestly used, and although the division into equal shares was free from objection, the ascertainment by the trustees of the total amount to be distributed, which depended on the due discharge of their own duties, was subject to the investigation and control of the Court; that it was not necessary for the plaintiff to prove any breach of duty by the trustees for the purpose of having accounts taken of the trust property, the right to this resulting from the mere relation between them, and that, irrespective of the charges made against the trustees, there should be the usual administration accounts. Soon after the testator's death his brother applied to be

TRUSTEE--*continued.*

himself appointed postmaster. In his application he stated that the testator had bequeathed all his property in trust to him and the testator's son, for the benefit of the testator's wife and children, and that, if the applicant were appointed the business would be carried on in the same premises. The brother was appointed postmaster, and he retained the post office on the testator's premises, and managed same in conjunction with the testator's other business for some years, when he set up in business for himself in the same town, and transferred the post office to his new premises:—*Held*, that the brother was absolutely entitled, for his own benefit, to the emoluments of the office of postmaster; that there could not be anything like a graft upon the former term of it for the benefit of the testator's assets, or any liability on the part of the officer to account for its profits; that he had a right to transfer the post office to his own premises, and that the utmost of his liability would be payment of compensation for the use and occupation of the office in the premises of the testator. The liability under a mere direction to account on the basis of wilful default does not apply to possible loss of profits in trading occasioned by the setting up by a trustee of a rival business. A plaintiff seeking relief against wilful default must allege in his pleading some specific act of wilful default, or, at least, make a strong case for inquiry. A trustee of a will carrying on the business of his testator is not guilty of a breach of trust in setting up for himself in a similar line of business in the neighbourhood, provided that he does not resort to deception, or solicitation of custom from persons dealing at the old shop. A trustee and manager of a business removed, however, under such circumstaces from being such trustee and manager. *Moore* v. *M'Glynn* - - - - - - V.-C. 74

—— Acting as solicitor in relation to trust estate—Costs - - - - - - 60
See SOLICITOR.

—— Power of appointment—Not exerciseable by newly appointed trustees - - 93
See GIFT TO A CLASS. 1.

—— Registration of title - - - 58
See REGISTRATION OF TITLE.

UNOCCUPIED PREMISES—Grand jury cess—Liability of owner in fee—Arrears recoverable - - - - - 48
See GRAND JURY CESS.

UTILITY—Invention - - - 417
See PATENT.

VENDOR AND PURCHASER—Sale, Chancery Division—Rental and conditions—Tithe rentcharge—Compensation 1
See COMPENSATION.

VENDOR AND PURCHASER—*continued.*
—— Sale of judicial tenancy—Mortgage—Land Law (Ireland) Act, 1881, s. 1—Right of Pre-emption - - - - - 179
See MORTGAGE.

VESTED GIFT—*Will—Construction—Gift of interest for maintenance—Severance from general personal estate.*] *M. B.*, by his will, directed his executors to invest £1000, and with the interest to pay an annuity of £30 to his wife for life, or until she should marry again, and directed the £1000 to be distributed, share and share alike, among all his children, to each respectively—if a boy, on his attaining twenty-four; and if a daughter, upon marriage with consent. The testator directed that a sum of £500 should be invested for the benefit of his younger children in equal shares, to be paid to each, if a boy, at the age of twenty-four, and if a girl, on marriage with consent. And the testator bequeathed the residue of his property, after certain other bequests, in equal shares, to all his children upon their attaining the age of twenty-four years respectively, and directed his executors to invest, for the maintenance of his children during their minorities, or if girls until their marriage, all the moneys to which they might respectively be entitled under his will:—*Held*, that the shares of the children in the £1000, in the £500, and in the residue, vested on the death of the testator. Where there is one gift of *corpus* and income as part of a whole, a gift otherwise contingent will be vested; but where there are separate gifts, one of capital and one of income, not necessarily going together, the gift will not be deemed vested. *Fox* v. *Fox* (L. R. 19 Eq. 286) considered. *Brennan* v. *Brennan* [V.-C. 69

WAIVER—Solicitor's lien—Judgment for costs
See SOLICITOR'S LIEN. 2. [225

WIDOW—Distributive share whether barred by settlement - - - - - 138
See DISTRIBUTIONS, STATUTE OF.

WIFE
See HUSBAND AND WIFE.

WILFUL DEFAULT—Trustee—Pleading 74
See TRUSTEE.

WILL—Death coupled with contingency—Gift to survivors - - - - - 299
See SURVIVOR. 1.

—— Execution of—Unattested codicil—Subsequent codicil not referring to prior codicil
See EXECUTION OF WILL. [508

—— Execution of power—Reference to power—Disposition of residue—Extrinsic evidence
See EXECUTION OF POWER. [118

—— Executor—Intermeddling with assets—Refusal to extract probate - 551
See EXECUTOR.

WILL—*continued.*
—— Gift of interest for maintenance—Severance from general personal estate—Vesting 69
See VESTED GIFT.

—— Gift to a class—"Then" living - 32, 93
See GIFT TO A CLASS. 1, 2.

—— Hotchpot clause—Portions—Ademption 267
See ADEMPTION.

—— Indefinite gift of income - - 209
See SURVIVOR. 2.

—— Knowledge and approval of contents—Presumption—Omission of clause by mistake - - - - - - 7
See KNOWLEDGE AND APPROVAL OF CONTENTS OF WILL.

—— Merger of charge—Probate duty - 252
See PROBATE DUTY.

—— Power to trustees to arrange for the settlement of children—Extent of control of Court - - - - - - 74
See TRUSTEE.

—— Survivorship—Meaning of clause after vested gift to children in equal shares - 209
See SURVIVOR. 2.

—— Testamentary paper—Subpœna to lodge—Service out of the jurisdiction - 310
See SERVICE OUT OF THE JURISDICTION. 1.

—— Trust to pay incumbrances out of accumulations of rent - - - - - 355
See ACCUMULATION.

WINDING-UP—*Company—Injunction to restrain proceedings in foreign Court—Submission to jurisdiction—Companies Act*, 1862 (25 & 26 *Vict. c.* 89) *sections* 87, 122, 163.] The petitioners in a winding-up under supervision, instituted proceedings in the Superior Court of Massachusetts to attach certain sums, representing cargo freight, then in the hands of a third party in Boston, and the property of the Company, for the purpose of acquiring, under the law of Massachusetts, a lien on the freight, which would give the petitioners priority over the other creditors of the Company. The petitioners were British subjects, carrying on business in London, and also, up to a short time before the matter came before the Court, in Ireland:—*Held*, that they should be restrained from further prosecuting the proceedings in the American Court. *In re Belfast Shipowners' Co.* [V.-C. 321; APP. 329

WORDS—"Circumstances for which the bankrupt cannot be justly held responsible"—35 & 36 Vict. c. 58, s. 56 - - - 517
See BANKRUPTCY.

—— "Give and bequeath"—Will - - 118
See EXECUTION OF POWER.

WORDS *continued.*
—— "In lieu of dower and thirds at common law or otherwise"—Settlement - 138
See Distributions, Statute of.
—— "Then living"—Will - - - 32, 93
See Gift to a Class. 1, 2.
—— "With benefit of survivorship"—Will 209
See Survivor. 2.

WRIT OF SUMMONS—Service out of the jurisdiction - - - 185, 385, 401
See Domicil.
Service out of the Jurisdiction. 2.

YEARLY TENANCY
See Tenancy from Year to Year.

THE END.

BIBL.